APPENDIX A

Frank COLACURCIO, Jr., dba DDF & S Investment Co.; David Ebert, dba DDF & S Investment Co.; Steve Fueston, dba DDF & S Investment Co., Plaintiffs-Appellants,

v.

CITY OF KENT, Defendant-Appellee.

No. 96-36197.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 1998.

Decided Dec. 8, 1998.

William P. Schoel and Jayne L. Freeman, Keating, Bucklin & McCormack, Seattle, WA, Roger A. Lubovich, City Attorney, Laurie A. Evezich, Assistant City Attorney, Kent, WA, for defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; Thomas S. Zilly, District Judge, Presiding. D.C. No. CV-95-01176-TSZ.

Before: HUG, Chief Judge, and REINHARDT and WIGGINS, Circuit Judges.

Opinion by Chief Judge HUG; Dissent by Judge REINHARDT.

HUG, Chief Judge:

In this case we examine whether the district court was correct in concluding as a matter of law that the City of Kent's ordinance, which requires nude dancers to perform at least ten feet from patrons, does not violate the First Amendment of the United States Constitution. Appellants, who planned to open a nightclub featuring

nude dancing on stage and personalized table dancing, argue that the ten-foot distance requirement amounts to a complete ban on table dancing, which they allege is a unique form of expression entitled to separate First Amendment analysis. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I.

Factual Background

Appellants desire to open a non-alcoholic adult nightclub in the City of Kent, Washington, featuring nude dancing on stage and personalized table dances. Appellants located a site in Kent and applied for a building permit.

The City of Kent has examined issues related to adult entertainment for several years. In 1982, the City's planning department published a study on the effects of adult entertainment on surrounding communities, including a discussion of various regulatory alternatives. Kent's initial regulatory effort involved a zoning ordinance, which Appellants challenged in 1994. The district court found that the zoning ordinance failed to designate a sufficient number of sites for the location of adult businesses. Pursuant to a settlement agreement, the City agreed to treat Appellants' proposed business as a lawful non-conforming use under the zoning law.

In March 1995, the Kent City Council adopted Adult Entertainment Ordinance 3214, establishing new standards for the licensing and operation of adult uses in Kent. In April 1995, that ordinance was amended by Ordinance 3221, in an effort to conform the legislation to

the King County Superior Court's ruling on a similar ordinance in Bellevue, Washington. Ordinance 3221, which has been codified as Kent City Code § 5.10.010 *et seq.*, provides, in relevant part:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas. KCC § 5.10.110(A).
>
> No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron. KCC § 5.10.120(A)(3).

The code also specifies minimum lighting requirements and prohibits dancers from soliciting or receiving tips from patrons. Shortly after enactment of the ordinance, Appellants brought this action for declaratory relief and damages pursuant to 42 U.S.C. § 1983.

Appellants contend that the ten-foot rule would effectively eliminate table dancing, which they argue is a unique form of expression entitled to separate First Amendment analysis. Unlike nude dancing performed on stage, table dancing is performed in close proximity to patrons. Appellants have submitted declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the potentially detrimental effects of the ten-foot rule on the dancers' erotic messages. Appellants also argue that table dancing is the primary source of income for exotic dancers, and that the Kent ordinance would make it uneconomical and therefore impossible for exotic dance studios to open or operate in Kent.

The City filed a motion for summary judgment, which the district court granted in November 1996. The district court ruled as a matter of law that (1) the ordinance was a content-neutral time, place and manner regulation; and (2) the ten-foot distance requirement was narrowly tailored and left open ample alternative avenues for communication of protected artistic expression. Appellants filed a timely notice of appeal.

II.

Standard of Review

A grant of summary judgment is reviewed *de novo*. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir.1997). We must determine, viewing the evidence in the light most favorable to Appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* We do not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue of material fact for trial. *Id.* When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. *Han v. Mobil Oil Corp.*, 73 F.3d 872, 875 (9th Cir.1995).

III.

Level of Protection for Nude Dancing

The parties and the district court correctly acknowledge that nude dancing is a form of expressive conduct

protected, to some degree, by the First Amendment.[1] There is understandable confusion, however, about the level of such protection. The district court cited a plurality opinion of the Supreme Court indicating that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Appellants cite to pre-*Barnes* Ninth Circuit precedent which accorded nude dancing full First Amendment protection. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986).

The fragmented nature of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general has resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which involved a zoning ordinance governing the location of adult theaters, a plurality of the Court agreed that adult entertainment should be regarded as "low value" speech: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.* at 70, 96 S.Ct. 2440. However, five Justices in *Young*, one concurring and four dissenting, argued that First Amendment protection

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[1] Supreme Court has determined that conduct is expressive when the following two factors are present: (1) intent to convey a particularized message; and (2) a substantial likelihood that the message will be understood by those receiving it. *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).

should not vary with the social value ascribed to speech by the courts. *See id.* at 73 n. 1, 96 S.Ct. 2440 (Powell, J., concurring); *Id.* at 85-87, 96 S.Ct. 2440 (Stewart, J., dissenting). Writing for our court in 1986, Judge Pregerson in Kev alluded to the voting tally in Young when he ascribed full First Amendment protection to nude dancing. Kev, 793 F.2d at 1058.

Fifteen years after *Young*, a plurality of the Supreme Court including Justices Rehnquist, O'Connor, and Kennedy, reiterated that nude dancing enjoys only marginal First Amendment protection. *Barnes*, 501 U.S. at 565-66, 111 S.Ct. 2456.[2] Two Justices concurred in *Barnes*, with four dissenters advocating full First Amendment protection. Because one concurrence did not reach the issue, *Barnes* represents a four-four split on the matter.[3]

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[2] *See also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (stating that "nude dancing is not without its First Amendment protections"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (noting that nude barroom dancing may involve only the "barest minimum of protected expression" which "might be entitled to First and Fourteenth Amendment protection "under some circumstances.").

[3] Justice Scalia, concurring, determined that because the statute did not regulate nude dancing in particular but instead regulated public nudity in general, the law was not specifically directed at expression and therefore was not subject to First Amendment scrutiny at all. *Barnes*, 501 U.S. at 572, 111 S.Ct. 2456 (Scalia, J., concurring). Justice Souter, concurring, accorded a low-level of First Amendment protection to nude dancing, noting that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Barnes*, 501 U.S. at 584, 111 S.Ct. 2456 (Souter, J., concurring) (citing *Young*, 427 U.S.

Scholars have grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment. Professor Lawrence Tribe noted that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." Tribe, *American Constitutional Law* §§ 12-18, p. 938 (2d Ed.1988). Although his comment was made prior to *Barnes*, the observation continues to be accurate today. Professor Erwin Chemerinsky views Supreme Court precedent as according sexually explicit expression "low-value" status. Chemerinsky, *Constitutional Law* § 11.3.4.4, p. 836-41 (1st Ed.1997). Professors Gerald Gunther and Kathleen Sullivan suggest that even in cases where courts do not explicitly treat sexual expression as lower-value speech, the decisions have implicitly treated such speech as a "subordinate species" in their tolerance of content-specific regulation. Gunther and Sullivan, *Constitutional Law* § 5(D), p. 1155-56 (13th Ed.1997).

IV.

Content Neutrality

Appellants contend that the district court erred in determining that the Kent Ordinance is content-neutral as a matter of law. Appellants argue that the ordinance is content-based on its face, and that the record shows that the City's predominant intent in passing the Ordinance

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at 70, 96 S.Ct. 2440)). Dissenting Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued for full First Amendment protection for nude dancing. *Barnes*, 501 U.S. at 593, 111 S.Ct. 2456 (White, J., dissenting).

was to ban adult entertainment in Kent. This contention is based on statements made by the mayor and other city officials, in addition to Kent's alleged pattern of adopting restrictive ordinances in response to proposals to build exotic dance studios.

Municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The Supreme Court has determined that this test is similar or identical to the *O'Brien* test generally applied to regulations affecting symbolic speech.[4]

In determining whether an ordinance is content-neutral, our principal inquiry is "whether the government

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[4] "[V]alidating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Under the standard set out in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), a regulation of symbolic expression is sufficiently justified if it: (a) is within the constitutional power of government; (b) furthers an important or substantial governmental interest unrelated to the suppression of expression; and (c) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. *Id.* at 377, 88 S.Ct. 1673. The Ninth Circuit frequently cites both tests when analyzing regulations of adult entertainment. *See, e.g., Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334-35 (9th Cir.1986) ("*Walnut I*"); *Kev*, 793 F.2d at 1058-59 & n. 3 (9th Cir.1986).

has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. The content-neutrality requirement is met if the involved ordinance is " 'aimed to control secondary effects resulting from the protected expression,' rather than at inhibiting the protected expression itself." *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir.1987)(quoting *Int'l Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir.1986)). *See also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29. Secondary effects may include, but are not limited to, threats to public health or safety. Building upon the Supreme Court's reasoning in *Renton*, we outlined the appropriate test in *Tollis*:

> If the ordinance is predominantly aimed at the suppression of First Amendment rights, then it is content-based and presumptively violates the First Amendment. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects in the surrounding community, the ordinance is content-neutral, and the court must then determine whether it passes constitutional muster as a content-neutral time, place and manner regulation.

827 F.2d at 1332 (internal citation omitted).

A city may establish its interest in a regulation by relying upon evidence "reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925. In evaluating the secondary effects of adult entertainment, the city is also permitted to rely on experiences of other jurisdictions. *Id.* A regulation is content-neutral if it is "justified without reference to

the content of the regulated speech." *Id.* at 48, 106 S.Ct. 925 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). A finding that the restriction of First Amendment speech is a "motivating factor" in enacting an ordinance is not of itself sufficient to hold the regulation presumptively invalid. *Id.* at 46-49, 106 S.Ct. 925.

The case law has not clarified when secondary effects warrant restriction of speech and how much proof there must be of these effects.[5] Similarly, precedent provides no standards for determining when an illicit but inconsequential "motivating factor" might develop into an illicit and controlling "predominant purpose." Precedent suggests that government defendants generally will prevail on the issue of content neutrality if evidence shows that the enactment can be "justified without reference to . . . speech." *See Kev*, 793 F.2d. at 1058-59 (internal quotations and citations omitted). This is a difficult standard to overcome, unless the challenger can show that the statute is speech-discriminatory on its face. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1108-09 (9th Cir.1986) (holding unconstitutional county ordinances which specifically exempted barroom nude dancing from their definitions of "expressive dance," thus effecting complete bans on nude dancing).

Contrary to Appellants' contention, the Kent ordinance is not content-based on its face. The ordinance does not distinguish between table dancing and other exotic

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[5] Chemerinsky, *Constitutional Law*, § 11.3.4.4., p. 840 (1997).

dance forms. Nor do the stated purposes mention the ills of table dancing or the goals of restricting offensive conduct. The ten-foot distance requirement applies to all forms of dancing within exotic dance studios.

We will look to the full record to determine whether evidence indicates that the purpose of the ordinance is to suppress speech or ameliorate secondary effects. In so doing, we will rely on all "objective indicators of intent," including the "face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment, the stated purpose, and the record of proceedings." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir.1984). The district court was correct in rejecting the City's claim that the court need only look to the stated purposes of the ordinance to find a permissible purpose.

Appellants cite to statements by city officials and others allegedly revealing the City's underlying speech-suppressive purposes. For example, Appellants quote the following statement by the City Attorney at a Planning Commission meeting:

> Since we cannot zone these type[s] of businesses out of the City, the licensing was looked at that was in place for this type of facility . . . As indicated, these uses cannot be prohibited, but they can be regulated.

Appellants also cite the following statement from the Planning Committee Chairman:

> With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. Because we've made it a little bit difficult for

them to make money in the traditional way they make money.

In determining the extent to which comments such as these should inform our analysis of predominant intent, we look to our decision in *Foley*. In *Foley*, we noted that individual statements by city leaders were admissible if they "showed the chain of events from which intent may be inferred, rather than merely the subjective intent of individual legislators." *Id.* at 1298. Put another way, the subjective statements cited by Appellants are relevant if they show objective manifestations of an illicit purpose, such as a departure from normal procedures or a sudden change in policy.[6] In the present case, the record does not indicate unusual procedural maneuvering on the part of the Kent Planning Committee, Planning Commission, City Attorney, or other City governing bodies. The enactment of the Kent Ordinance was consistent with the City's comprehensive planning policy, and reflects no procedural lapses that might suggest unjust treatment. Objective indicators of illicit purpose are not present here.

Appellants disagree, contending that Kent's history reflects a clear pattern of adopting "the most restrictive regulations possible" in response to proposals to build nude dance studios in the City. This contention is rebutted by the record. The record indicates that Kent's

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[6] Equal protection cases may provide some guidance in this regard. *See, e.g, Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267-68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (allowing courts to consider "contemporary statements by members of the decisionmaking body" as evidence of sudden changes in policy or departure from normal procedures).

approach has grown more lenient over time. Evidence suggests that after the failed zoning attempt, City leaders learned that unduly restrictive regulations would not survive judicial review. The City Attorney's comments at a 1995 Planning Commission meeting reflect this awareness: "These uses cannot be prohibited but they can be regulated . . . the question is where do we put this type of business and how many sites do we allow." The record indicates that the City devoted considerable resources to developing an ordinance that would be constitutionally sound. Kent's distance requirements were modeled after regulations upheld in Kitsap County, Bellevue, King County, and Kelso.[7]

Even if we were to accord substantial weight to the mixed motivations of certain City officials, the record indicates that the City's documentation of permissible purposes satisfies *Virginia Pharmacy Board* and *Renton*. Kent's ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts. In formulating the ordinance, the City relied on the study, concluding that regulation of adult uses was an important factor in controlling prostitution, drug dealing, and other criminal activity. *See e.g., Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1258 (5th

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[7] Kent's 1982 study also indicates an intent to assimilate rather than eliminate adult uses: "The City of Kent seeks to assimilate adult uses into the overall urban fabric with the least adverse impact to the business and residential environments." City of Kent Planning Dept., Adult Use Zoning Study 41 (1982). "A secondary objective is to discuss the ability of the City to provide services – primarily protective services – based on alternative locational requirements for adult uses." *Id.*

Cir.1992) (treating reliance on formal studies as evidence of permissible purpose). The record also includes affidavits and statements by police officers and vice detectives documenting the connection between table dancing and illegal sexual activity. We find, therefore, that the Kent Ordinance is justified without reference to speech.

V.

Narrow Tailoring

Appellants argue that the ten-foot distance requirement fails the narrow tailoring requirement because there are less-speech-restrictive means of achieving the same results. Appellants contend that summary judgment was improper because the district court failed to consider less burdensome alternatives such as a "no touch" ordinance and a one-foot distance requirement.

A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests, but it need not be the least restrictive or the least intrusive means of doing so. *Ward*, 491 U.S. at 798-99, 109 S.Ct. 2746. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). This standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's interests. "Government may not regulate expression in such a manner that a substantial

portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746.

The validity of a time, place, or manner regulation "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897 (citing *Clark*, 468 U.S. at 299, 104 S.Ct. 3065). Such restrictions will not violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897.

The district court was correct in concluding that the ten-foot setback is narrowly tailored to achieve Kent's objectives. The courts have emphasized that judges should not supplant the legislature's role in developing the most appropriate methods for achieving government purposes. *See, e.g., DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir.1997) (upholding a six-foot distance requirement, the court stated that "it is not for us to say that a seven-foot zone or a five-foot zone would strike a better balance.")

As to whether the ordinance burdens substantially more expression than necessary, the district court was correct in concluding that this argument is foreclosed by our earlier decision in *Kev*, which upheld a similar ten-foot distance requirement. *Kev*, 793 F.2d at 1061. Appellants argue that because *Kev* was decided prior to the Supreme Court's decision in *Ward*, the *Kev* court did not have occasion to apply the *Ward* test, which protects speech from unnecessary burdens. *See Ward*, 491 U.S. at 798, 109 S.Ct. 2746.

This argument fails for two reasons. First, we need not reach the issue, as we leave the fine-tuning of the distance requirement to the legislative body. Second, at the time *Kev* was decided, Supreme Court precedent included speech-protective language similar or identical to that in *Ward*. *See, e.g, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (requiring the ordinances in question to "respond [ ] *precisely* to the substantive problem which legitimately concerns [the government]."") (emphasis added); *Clark*, 468 U.S. at 297, 104 S.Ct. 3065 (same); *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673 (requiring the incidental restrictions on First Amendment freedoms to be "no greater than is essential to the furtherance" of the asserted governmental interests).

Several courts have upheld distance requirements as a narrowly tailored means of controlling illegal sexual contact and narcotics transactions. In *BSA Inc.*, we upheld a six-foot distance requirement while prohibiting a total ban on nude barroom dancing, stating that the distance requirement "imposes at most a very minimal restriction on First Amendment activity." 804 F.2d at 1112. The four dissenting Justices in *Barnes*, arguing against the statewide ban on public nudity, supported distance requirements as a less-restrictive means of furthering the government's interest in protecting public health and safety. *Barnes*, 501 U.S. at 594, 111 S.Ct. 2456. *See also, DLS, Inc. v. Chattanooga*, 107 F.3d 403 (6th Cir.1997) (six-foot distance requirement); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo.1995) (en banc) (three-foot); *Zanganeh v. Hymes*, 844 F.Supp. 1087 (D.Md.1994) (six-

foot); *T-Marc, Inc. v. Pinellas County,* 804 F.Supp. 1500 (M.D.Fla.1992) (three-foot); *Ino Ino, Inc. v. City of Bellevue,* 132 Wash.2d 103, 937 P.2d 154 (Wa.1997) (en banc) (four-foot).

Furthermore, the less-restrictive alternatives presented by Appellants arguably are not "reasonable" alternatives as they would not serve the City's purposes of controlling drug transactions and prostitution. The one-foot and "no-touch" ordinances would be unenforceable, as both would fail to provide sufficient line-of-vision for law enforcement personnel. An earlier "no-touch" ordinance in Kent failed for this reason. In addition, both of these options would permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex.[8] It is unclear from the record whether Appellants would support a four-foot distance requirement. While claiming at one point that such a regulation would be narrowly tailored, Appellants state elsewhere in the record that a four-foot requirement put them out of business in Bellevue. Although a four-foot distance requirement would keep patrons and dancers just out of arm's reach, a ten-foot requirement covers two arm spans and keeps patrons out of earshot. Appellants have failed to present evidence showing that a ten-foot rule burdens substantially more expression than necessary to achieve its purpose. We find, therefore,

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[8] We note that, according to Appellants' own evidence, an ordinance imposing a distance requirement any greater than six inches would effectively ban table dancing. The declaration of Appellants' expert cultural anthropologist defines table dancing as a dance performed in front of an audience at a distance of one to six inches.

that summary judgment was proper on the issue of content-neutrality.

VI.

Alternative Channels of Communication

The final attribute of a valid time, place and manner regulation is that it must "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. What makes this case unusual is Appellants' claim that table dancing is a unique form of protected expression that is qualitatively different from nude stage dancing and entitled to separate First Amendment analysis. Appellants contend that the Kent ordinance fails to leave open ample alternatives, as a ten-foot distance requirement would eliminate table dancing altogether, an essential element of which is close proximity between dancers and patrons. Appellants argue that, unlike stage dancing, table dancing uses "not just vision but multi-sensory perception to communicate its message though the sounds, smells, and movements of the dancer within the [patron's] intimate perimeter." Therefore, the district court misapplied the law by failing to acknowledge the uniqueness of table dancing and instead holding that the ordinance "merely diminishes to a limited degree the effectiveness of the erotic message conveyed by the dance." Appellants support their theory with declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the detrimental effect of the ten-foot rule on the dancer's message.

The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 525-27, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (Brennan, J., concurring). The Court has been particularly hesitant to close off channels of communication which provide individuals with inexpensive means of disseminating core political messages. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 54-56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (ordinance banning residential signs almost completely foreclosed "a venerable means of communication that is both unique and important" and for which there is no adequate substitute, particularly for persons of modest means);[9] *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 146, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

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[9] The *Ladue* Court noted, "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate." *Ladue*, 512 U.S. at 57, 114 S.Ct. 2038. The Court also noted that "Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war." *Id.* at 54, 114 S.Ct. 2038 (internal citations omitted).

Assuming arguendo that table dancing is a unique form of expression, precedent indicates that uniqueness, alone, is insufficient to trigger separate First Amendment protection. We recently emphasized this point in *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir.1996). Acknowledging that a ban on wearing message-bearing T-shirts would raise serious constitutional questions, the same was not true for selling T-shirts: "[W]e do not believe the sale of message-bearing T-shirts is so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute." *Id.* at 1015 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (emphasis added)).[10]

Appellants' argument misses a central point – in assessing a First Amendment challenge, we look not only at the private claims asserted in the complaint, but into the governmental interests protected by the enactment. As the Supreme Court noted in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with . . . 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' " *Id.* at 389, 112 S.Ct. 2538 (quoting *Renton*, 475 U.S. at 48, 106

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[10] The court elaborated on this point: "While selling T-shirts is a unique form of expression in the sense that serving message-bearing raviolis or preaching on street corners in a Donald Duck voice would be unique, it does nothing to make the message uniquely significant or effective." One World, 76 F.3d at 1015.

S.Ct. 925). Using this reasoning, we upheld an ordinance prohibiting "tagging," the practice of distributing flyers and soliciting funds from automobile passengers while stopped at red lights. *Acorn v. City of Phoenix*, 798 F.2d 1260 (9th Cir.1986). Although the appellants, a non-profit group, had argued that tagging was a "uniquely effective method of fundraising," *id.* at 1271, we determined that the ordinance was justified for traffic control and public safety purposes. *Id.* at 1268-70. *See also Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117 S.Ct. 855, 866, 137 L.Ed.2d 1 (1997) (holding that public safety interests justified fifteen-foot "fixed buffer zone" separating abortion protestors from abortion clinics). The prohibitions in Acorn and Schenck were upheld despite the fact that they were analyzed under the rigorous standards applied to speech regulation in traditional public forums, where "the government's ability to permissibly restrict expressive activity is very limited." *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).[11] We conclude that table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment.

In support of their claim that the Kent ordinance effects a complete ban on a unique mode of expression,

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[11] Traditional public forums are "places which by long tradition or government fiat have been devoted to assembly and debate." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Although in *Acorn*, we did not decide whether traffic-filled intersections should be considered public forums, we nevertheless applied public forum analysis to the case. *Acorn*, 798 F.2d at 1267.

Appellants borrow from public forum analysis to argue that the applicable "forum" for a table dance is not the whole cabaret, but merely the area required for performing the table dance. According to this argument, the ten-foot distance requirement fails to leave open ample alternative avenues of expression within that forum.

Although the time, place and manner test applied to regulations affecting adult entertainment was initially developed for speech in public forums, Appellants are incorrect in attempting to extend all aspects of the public forum principle to private nightclubs. Even assuming the forum concept were applicable here, Appellants' argument fails due to the incongruity of its potential results. Following Appellants' logic, we would be required to provide separate First Amendment protection to so-called "lap dancing," arguably another unique form of expressive conduct in which the nude or semi-nude dancer performs in the patron's lap. Any distance requirement, even a one-foot setback, would amount to a flat ban on communication within that "forum."

Appellants' fluid definition of relevant forums, if carried to its logical conclusion, would require courts to subdivide audiences to the extent that any speech-restrictive regulation would necessarily fail. Again, Appellant's theory would lead to the ironic result that forms of expressive conduct with documented connections to criminal activity would enjoy special constitutional protection. The district court was correct in rejecting this proposition. If forum analysis is relevant here, the appropriate forum is the entire cabaret. Even assuming that the audiences for table dancing and stage dancing are distinguishable, there is undoubtedly a high degree of overlap.

The ten-foot distance requirement does not rob dancers of their forum or their entire audience.

Appellants also provide an economic argument to support their claim that a ten-foot distance requirement would foreclose an entire medium of expression. Appellants contend that the distance requirement and prohibition on tipping would prevent exotic dancers from making a living in Kent, and would make it uneconomical and therefore impossible for adult clubs to open and operate in the city. Appellants allege that income from table dances is the main source of revenue for Appellants' entertainers, who are not compensated for stage dances. Table dancers in Appellants' establishments are independent contractors who pay rental fees to the dance studios. These fees are a primary source of revenue for the enterprise. Appellants allege that the four-foot distance requirement imposed in Bellevue caused profits to drop at their Bellevue establishment, requiring it to close.[12]

We recognize that determining whether a governmental action will foreclose an entire medium of expression can be a difficult undertaking. In some cases, as in *Ladue* (signs) or *Struthers* (handbills), a ban will be evident from the face of the ordinance. In other instances, as in the case at bar, it is not. The test for determining whether an adult business' First Amendment rights are

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[12] Appellants allege that, after a four-foot setback requirement was effectuated in Bellevue, the average number of dancers per week dropped from fifty to twelve, and thirty-eight dancers quit their jobs. Appellants also noted that "few if any" patrons purchased table dances.

threatened is whether a [sic] the government has "effectively den[ied]" the business "a reasonable opportunity to open and operate" within the city or area in question. *Renton*, 475 U.S. at 54, 106 S.Ct. 925. We elaborated on this test in *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir.1996). The test is whether a business could operate under the regulations at issue, not whether a particular business will be able to compete successfully within the market. *Id.* at 666.[13] "[I]n the absence of any absolute bar to the market . . . it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business'." *Id.* (quoting *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir.1993)).

The market access test has been applied to adult zoning cases, where total foreclosure of the market can be ascertained by calculating available locational sites. We have held unduly restrictive adult zoning ordinances to be unconstitutional on this basis. *See, e.g., Walnut Properties, Inc. v. City of Whittier (Walnut Properties II)*, 861 F.2d 1102, 1110 (9th Cir.1988) (holding that zoning ordinance's acute restriction on available acreage would deny adult theaters a reasonable opportunity to operate in the city, and would force closure of all existing adult businesses).

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[13] In other words, *Spokane Arcade* clarified that the scope of permissible economic analysis is whether one is permitted to enter or participate in the market in the first instance. *Id.* "Even if the costs of compliance were so great that [appellants] would be forced out of business, the ordinance[ ] do[es] not pose any intrinsic limitation on the operation of the [business]." *Id.* at 667.

The analysis may be even more complicated when, as here, distance requirements are involved. However, Appellants have not presented economic evidence sufficient to show that the ten-foot distance requirement would serve as an absolute bar to market entry, as required under *Spokane Arcade*. Rather, Appellants have merely shown a potential loss in profits, which arguably could be remedied by restructuring the way they do business. The fact that Appellants hire their dancers on an independent contractor basis, refuse to pay their dancers for dancing on stage, require their dancers to pay rental fees, and limit their dancers' remuneration to tips from patrons, appears to us to be an effort to maximize profits while minimizing dancers' economic security.

As to Appellants' contention that table dancing is a unique form of expression entitled to separate First Amendment analysis, this issue is not outcome determinative, because uniqueness, alone, is insufficient to trigger special protection.

VII.

For the reasons described herein, we determine that the district court was correct in ruling as a matter of law that the Kent ordinance is content neutral, and that the ten-foot distance requirement is narrowly tailored and leaves open ample alternative avenues for communication of protected expression. The judgment of the district court is

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent. I believe that the district court erred in granting summary judgment. By requiring nude dancers to perform on a raised platform and to remain at least ten feet away from customers, the City of Kent effectively outlawed table-dancing. The issue before us is whether table dancing constitutes a separate form of expressive communication from other types of nude dancing – that is, whether table dancers communicate a message different in content than that communicated by nude stage dancers, and other nude dancers who perform at a distance of more than ten feet from their customers. The appellants presented sufficient evidence to establish a triable issue of fact on that question. By doing so, they have precluded a judicial determination that the ordinance is content-neutral as a matter of law. Because the district court reached that very conclusion, I would reverse and remand for trial.

As an initial matter, I disagree with Section III of the majority opinion, which resolves no legal issues, but seeks to leave the impression that nude dancing may merely be "low-value" speech entitled to "only marginal First Amendment protection." The panel admits that erotic dancing is constitutionally protected but claims that the extent of that protection is unclear, thus implying that it is unnecessary to look too closely at the restrictions on speech at issue in this case. I disagree. In this Circuit, it *is* clear that nude erotic dancers are entitled to full First Amendment protection for the expressive messages conveyed in their dancing. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986).

I also disagree with the majority that the ten foot setback at issue in this case is content-neutral as a matter of law. A regulation on constitutionally protected speech is content-neutral only if it is justified without reference to the content of the regulated speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Kent's ordinance requires that all entertainers perform on a stage at least two feet above the patron seating area, and that no performer may dance any closer than ten (10) feet from any patron. The majority concludes that this law is content-neutral because it is not content-based "on its face."

This determination obviously begs the question at issue here: what is the content of the message communicated by the table dancer, as opposed to the stage dancer? If it is the same message – only magnified by proximity – then the majority is correct. If, however, stage dancers and table dancers communicate different expressive content in their respective messages, then summary judgment was improper. Appellants argue that the ordinance on its face bans certain forms of communication because it bars close physical proximity between dancers and patrons. They assert that proximity itself – the distance, or lack thereof, between the dancer and the patron – is integral to the message conveyed by table dancing. This message is entirely different, they contend, than the message conveyed by stage dancers.

In support of this contention, appellants proffered the testimony of cultural anthropologist Judith Hanna, a Senior Research Scholar at the University of Maryland. Hanna is the author of four books and approximately 80 scholarly articles on the anthropology of dance as non-

verbal communication. She has conducted extensive fieldwork in exotic dance establishments as well as interviews with dancers and patrons. Hanna asserts that table dancers seek to send a message that is entirely different from that sent by stage dancers:

> The message of the table dancer is personal interest in and understanding of the customer. . . . The entertainer creates an illusion of concern and availability for the customer and seeks to effect a transformation in the patron's feelings. Some customers get the personal attention of an attractive female who would not otherwise related [sic] to them or "give them the time of day;" some customers are reminded of what is [sic] to be desired.

Hanna concluded that close proximity between the dancer and the patron is an integral and essential part of the message itself. This is so, according to Hanna, not only because of the message of personal interest sent by the dancer's physical presence but also by other nonverbal communication that is only possible in close quarters. Specifically, Hanna testified that "proximity permits eye contact and awareness of indicators of attraction and satisfaction such as the mouth position, eye brightness, pupil dilation and expansion, facial color, breath, perfume, and body odors."

Appellants also introduced the declaration of Dr. Edward Donnerstein, the chair of the University of California-Santa Barbara Department of Communications who has studied the impact of distance on audience perceptions of erotic dance performances. Dr. Donnerstein, who was the lead social scientist called to give

expert testimony before former United States Attorney General Edwin Meese's Commission on Pornography, concluded that proximity is not merely an incidental component of erotic dance but is integral to the message itself. He concluded that

> The relational and erotic communication sought to be communicated by erotic dance performance is significantly and substantially effected (sic), reduced, and degraded by the requirement that performers be separated from their intended audience by a minimum distance of ten (10) feet.

Both Hanna and Donnerstein contrasted the message sent by physical closeness with that sent by the distance imposed by stage dancing, which, Hanna testified, transmits an entirely different signal: "coldness and impersonality." Appellants contend, with the support of their experts' declarations, that stage dancing communicates "the remoteness of the 'unreachable' object of desire" through its use of distance. Appellants, by producing these declarations, have created a material question of fact regarding whether table dancing is, as the district court and the majority conclude, merely stage dancing at a "louder volume," or whether it is an altogether different form of expression that depends upon proximity, and communicates a different and particular content.

To the extent that a reasonable trier of fact might conclude that table dancing and stage dancing are qualitatively distinct forms of expression, the ordinance is itself facially content-based. Moreover, evidence was adduced by appellants that Kent banned proximity precisely because it wants to constrain dancers from doing

the very things that according to appellants' experts are essential to the message – chiefly getting close enough to the patrons so that they can communicate the message in the form that only table dancing permits.

Given the circumstances set forth above, the factual issue created by appellants' expert testimony is one for a jury. It was not appropriate for the district court or this court to substitute its own views regarding the purpose and effect of table dancing and decide as a factual matter the content of the message conveyed by that form of expressive communication. Accordingly, I would reverse the district court's grant of summary judgment.

APPENDIX B

Frank COLACURCIO, Jr., et al., Plaintiffs,

v.

CITY OF KENT, Defendant.

No. C95-1176Z.

United States District Court,
W.D. Washington.

Nov. 1, 1996.

Gilbert Henry Levy, Seattle, WA, for Plaintiffs.

William P. Schoel, Jayne L. Freeman and Keating, Bucklin & McCormack, Seattle, WA, Roger A. Lubovich, City Attorney, Kent, WA, for Defendant.

ORDER

ZILLY, District Judge.

THIS MATTER comes before the Court on the City of Kent's motion for summary judgment (docket no. 20). The Court heard oral argument on the motion on August 30, 1996, and subsequently requested supplemental briefing on certain issues.[1] The Court, having considered the

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[1] By Minute Order entered September 19, 1996, the Court directed the parties to file supplemental briefs on the following issues: (1) whether table dancing itself is a "uniquely valuable or important mode of communication" entitled to First Amendment protection (*see Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118, 2132-33, 80 L.Ed.2d 772 (1984)), such that the regulation of table dancing, as opposed to erotic dancing as a whole, is subject to the "narrow tailoring" test as

parties' arguments and all papers filed in support of and in opposition to the defendant's motion, including the parties' supplemental memoranda, hereby GRANTS defendant's motion for summary judgment and DISMISSES plaintiffs' federal law claims with prejudice. The Court dismisses plaintiffs' state law claims without prejudice.

Background

Plaintiffs Frank Colacurcio, Jr., David Ebert, and Steve Fueston, doing business as DDF & S Investment Company, desire to open a nonalcoholic adult nightclub in the City of Kent which will feature erotic entertainment, including nude dancing on stage and table dancing. The plaintiffs have located a site for their business in the City of Kent and applied for a building permit. Pursuant to a settlement agreement between the plaintiffs and the City of Kent in a case challenging the City's zoning laws, the City agreed to treat the plaintiffs' business as a lawfully established non-conforming use under the City of Kent adult use zoning laws once the building permit was issued.

On March 7, 1995, the Kent City Council adopted Ordinance 3214, which sets new standards for the licensing and operation of adult uses in the City of Kent. On

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set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989), (2) whether the "10 foot" rule in the ordinance imposes any non-economic burdens on the dancer's ability to communicate effectively, and (3) whether the "10 foot" rule in the ordinance leaves open ample alternative avenues of communication.

April 18, 1996, that ordinance was amended by Ordinance 3221, in an effort to conform to the King County Superior Court's ruling on a similar ordinance in Bellevue. *See Ino Ino, Inc. v. City of Bellevue*, King County Cause No. 95-2-02025-9. Adult Entertainment Ordinance 3221, which has been codified as Kent City Code § 5.10.010 et seq., provides in part:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas. [KCC 5.10.110(A)].
>
> All dancing and adult entertainment by an entertainer shall occur on the entertainment performance areas intended for that purpose described in section 5.10.110(A). [KCC 5.10.120(A)(2)].
>
> *No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron.* [KCC 5.10.120(A)(3)] (emphasis added).

Because the nightclub the plaintiffs intend to open in Kent will feature nude dancing and erotic entertainment, it is subject to the requirements of the ordinance.

Soon after the City adopted the ordinance, the plaintiffs brought this action for declaratory relief and damages pursuant to 42 U.S.C. § 1983. Plaintiffs challenge the constitutionality of the ordinance's "10 foot rule," arguing that it effectively eliminates "table dancing," which they contend is a unique medium of expression protected by the First Amendment. Table dancing, the plaintiffs contend, is the primary source of income for erotic

dancers, and its elimination as a form of entertainment makes it economically unfeasible for dancers to dance in, and adult entertainment businesses to operate in, the City of Kent. Plaintiffs argue that "[i]n the context of erotic dancing, moving the dancer ten feet away from the patron actually effects (sic) and substantially alters and degrades the erotic message being conveyed. . . . A lesser set back between patrons and entertainers has proven to be sufficient to cure the problems of illegal sexual contact." Plaintiffs' Opposition Memo at 8 (docket no. 27). Plaintiffs also contend that the ordinance is an unconstitutional time, place, and manner regulation because the record shows that the Kent City Council's predominant purpose in passing the ordinance was to suppress protected speech, not to control the secondary effects resulting from that speech.

Discussion

I. *Summary Judgment Standard*

Summary judgment is proper only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of establishing an absence of genuine factual issues. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir.1990). The party opposing summary judgment may not rest upon the mere allegations or denials of his or her pleading, but must set forth specific facts demonstrating the existence of a genuine issue for trial. Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The Court should assume the truth of evidence proffered by the party opposing summary judgment and draw all reasonable inferences in a light most favorable to the nonmoving party. *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir.1991). The Court need not make findings of fact; rather the Court need only perform a threshold inquiry to determine whether genuine material issues exist that can only be resolved by a trier of fact. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

In this case, the parties do not dispute the existence or application of the ordinance being challenged, and there are no genuine issues of material fact relevant to the constitutional analysis. Therefore, it is appropriate for the Court to determine on summary judgment whether the ordinance is constitutional. *Cf. Paulsen v. Gotbaum*, 982 F.2d 825, 828 (2nd Cir.1992).

II. *The Ordinance is a Permissible Time, Place and Manner Regulation under the First Amendment*

Erotic dancing is a protected expression under the *First Amendment. Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir.1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir.1986). Similarly, nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560, 111 S.Ct. 2456, 2457, 115 L.Ed.2d 504 (1991). Although erotic dancing, nude or otherwise, is expression protected by the First Amendment, "it 'does not guarantee the right to [engage in the protected expression] at all times and places or in any manner that may be desired.' " *Kev*, 793 F.2d at 1058 (quoting *Heffron*

v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981)). Thus, a city, "when acting to further legitimate ends of the community, may impose incidental burdens" on this form of protected expression. *Kev*, 793 F.2d at 1058.

In *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), the Supreme Court held that municipalities may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are (1) justified without reference to the content of the regulated speech, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986) ("[S]o called 'content neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.").

A. *Kent's Ordinance Is Content-Neutral Time, Place and Manner Restriction*

The Kent ordinance is a time, place and manner regulation because it does not ban erotic dancing altogether, but rather restricts such dancing to a location no closer than ten feet to any patron. *Renton*, 475 U.S. at 46, 106 S.Ct. at 928. *See also Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir.1987) (regulation was time, place, and manner regulation because it did not ban adult theaters altogether).

In determining whether the ordinance is content neutral, the principal inquiry "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791-93, 109 S.Ct. at 2753-55 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 104 S.Ct. 3065, 3070, 82 L.Ed.2d 221 (1984)). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (citing *Renton*, 475 U.S. at 47-48, 106 S.Ct. at 928-29). "Regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech are properly characterized as content-neutral, as long as the regulations are justified without reference to the content of that speech." *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir.1991) (citing *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988)).

The content-neutrality requirement is met if the involved ordinance is "aimed to control secondary effects resulting from the protected expression" rather than at inhibiting the protected expression itself. *Tollis*, 827 F.2d at 1332. Thus, the court's initial determination in any action challenging the content-neutrality of an ordinance is "whether the 'predominate (sic) purpose in enacting the ordinance is suppression of first amendment rights' or, instead, the amelioration of deleterious secondary effects." *Id.* (quoting *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334 (9th Cir.1986)).

> If the ordinance is predominantly aimed at the suppression of first amendment rights, then it is

> content-based and presumptively violates the first amendment. *Renton*, 475 U.S. at 45-47, 106 S.Ct. at 928. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects, then the ordinance is content-neutral and the court must then determine whether the ordinance passes constitutional muster as a content-neutral time, place, and manner regulation.

Id. A finding that the restriction of first amendment speech was "a motivating factor" in enacting the ordinance is not of itself sufficient to hold the regulation presumptively invalid. *Renton*, 475 U.S. at 47-49, 106 S.Ct. at 929.

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . "
>
> " . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

Id. at 48, 106 S.Ct. at 929 (quoting *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968)).

Plaintiffs contend that the City of Kent's predominant intent in passing the Ordinance was to ban adult entertainment in the City of Kent, rather than to limit the secondary effects of such entertainment. Plaintiffs' contention is based on statements made by the mayor, city officials, and others; a pattern of the City adopting Ordinances as exotic dance studios were being proposed in

the City; and a history of imposing the most restrictive regulations possible on adult entertainment businesses.[2]

The defendant counters that in determining the predominant intent of the City in enacting the ordinance, the Court need not look any further than the language of the ordinance itself. The City contends that where the ordinance *by its terms* specifies that its purpose and intent is to eliminate deleterious secondary effects, it is content-neutral.

While it is true that most courts give great weight to the language of the ordinance and its stated purpose, at least one court has noted that "[t]his language [alone] might not save a statute that was formulated without specific attention to specific secondary effects." *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1259 (5th Cir.1992), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993). The proper inquiry is to consider all "objective indicators [of intent] as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir.1984).

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[2] In support of their argument, plaintiffs submit the Declaration of R. Bruce McLaughlin, a land use planning and local government consultant, who concludes based on a review of the record that the City's goal in enacting the ordinance "was other than legitimate." McLaughlin Decl. at 23. McLaughlin's opinions do not constitute expert testimony under Fed.R.Evid. 702. McLaughlin has no specialized knowledge, skill, training, education, or experience that would qualify him to offer an opinion on the purpose of the ordinance. Moreover, his opinion is based on speculation and conjecture.

The Kent ordinance provides that its purpose and intent is:

> . . . to alleviate undesirable social problems that accompany adult entertainment businesses, and to enact content neutral regulations which address the secondary effects of adult entertainment businesses as well as health problems associated with such business, not to curtail the First Amendment expression, namely, dancing or entertainment.

KCC 5.10.020. While this language alone is insufficient to establish that the City's predominate [sic] intent was curbing secondary effects, the record reflects that the City had previously studied the secondary effects of adult entertainment and relied upon the results of those studies in formulating the ordinance. The City has concluded based on a review of its studies that regulation of the adult entertainment industry is necessary to prevent the significant criminal activity that has historically and regularly occurred in these establishments, including prostitution, narcotics and liquor law violations, and breaches of the peace. *See* Lubovich Affid. and attachments, Covey Affid.; KCC § 5.10.010(2). The City has also considered the potential adverse impact on property values resulting from these activities, and has taken steps to prevent to the extent possible a decline in property values. Lubovich Affid. and attachments.

Plaintiffs contend that the City's true, but hidden, intent in enacting the ordinance was different from what the ordinance states. They cite numerous statements by city officials and others which allegedly show that the City's predominant purpose in enacting the ordinance

was suppression of protected speech. Plaintiffs cite, for example, the following statement by City Attorney Roger Lubovich made on March 27, 1995, at a Planning Commission meeting:

> "Since we cannot zone these type[s] of businesses out the City, the licensing was looked at that was in place for this type of facility. . . . As indicated, these uses cannot be prohibited, but they can be regulated."

Plaintiffs' Opposition Memorandum (docket no. 27) at 6. Plaintiffs also cite a statement from the Chairman of the Planning Committee, made at a meeting on April 10, 1995:

> "With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. *Because we've made it little bit difficult for them to make money in the traditional way they make money.*"

Id. (emphasis added).

Many of the statements cited by the plaintiffs reflect personal opinion or were in response to statements by constituents that they "don't want nude dancing in Kent." *See* McLaughlin Decl. at ¶ 27. *See also id.* at ¶ 32 ("It is my sincere hope that the stiff regulations that City Council has accepted regarding adult entertainment will cause the businessman to lose interest in developing here."); ¶ 33 (" . . . We've got one in the neighborhood, whether we like it or not. Hopefully he won't pick up his permit though."); ¶ 36 ("[if this ordinance holds up], nobody's going to want to come to this city."). Such

statements regarding individual motivation and viewpoint, some of which were made by individuals who were not on the city council and therefore had no ability to enact the ordinance, are precisely the types of statements that the Supreme Court held in Renton would not support a finding that the purpose of the regulation was suppression of protected speech. *See also Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858, 862 (8th Cir.) (a handwritten statement by the city attorney that he "want[ed] to shut these places down!" somehow "[fell] far short of what would suffice to justify disregarding the plain and clear statement of the ordinance's purpose."), *cert. denied*, 513 U.S. 867, 115 S.Ct. 186, 130 L.Ed.2d 120 (1994).

Plaintiffs contend that the evidence of improper motive that they have submitted at a minimum creates a genuine issue of material fact on the issue of predominant intent, thereby precluding summary judgment on the question of content-neutrality. The Court concludes, however, that summary judgment on the issue of content-neutrality is appropriate here because the evidence plaintiffs rely upon is insufficient as a matter of law to establish improper intent.

"[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute" on the ground that "a punitive purpose in fact lay behind the statute." *Flemming*, 363 U.S. at 617, 80 S.Ct. at 1376. The evidence submitted by the plaintiffs here demonstrates only that certain City officials and others made negative statements about the prospects of having adult entertainment establishments in the City. These personal reflections and observations are insufficient to justify disregarding the

plain and clear statement of the ordinance's purpose and the balance of the record. *Renton*, 475 U.S. at 47-48, 106 S.Ct. at 928-29. As the Supreme Court has cautioned, "[j]udicial inquiries into [legislative] motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435 (1960).

The Court concludes that the plaintiffs' evidence of individual motivation and viewpoint fails to raise a genuine issue of material fact on the question of predominant intent. The Court finds that the predominant intent of the City in enacting the ordinance was to prevent secondary effects, and thus the ordinance is content-neutral.

B. *Kent's Ordinance Is Narrowly Tailored to Serve a Substantial Governmental Interest, and Leaves Open Alternative Avenues of Expression*

"Curtailing public sexual contact and sexual criminal offenses represents a significant state interest." *BSA, Inc.*, 804 F.2d at 1111. Thus, ordinances regulating the distance between performers and patrons in adult entertainment establishments serve a substantial governmental purpose. *See Kev, Inc.*, 793 F.2d at 1061; *BSA, Inc.*, 804 F.2d at 1111. The plaintiffs do not dispute the City of Kent's substantial interest in curtailing sexual criminal offenses. Plaintiffs do contend, however, that the Ordinance is not narrowly tailored and unreasonably limits alternative avenues of communication.

In *Ward*, the Supreme Court held that the requirement of narrow tailoring is satisfied "so long as the

. . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." 491 U.S. at 798, 109 S.Ct. at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906-07, 86 L.Ed.2d 536 (1985)). *Ward* expressly rejected the argument that the government must choose the "least restrictive means" or the "least restrictive alternative" in order to satisfy the narrow tailoring requirement. *Id.* 491 U.S. at 798-99, 109 S.Ct. at 2757-58 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."). The Court explained that provided "the means chosen are not substantially broader than necessary to achieve the government's interest, [ ] the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S.Ct. at 2758. Thus, restrictions on time, place or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 797, 109 S.Ct. at 2757 (quoting *Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906-07).

"Table dancing" is the performance of an erotic dance for one particular customer. Plaintiffs argue that table dancing is a unique form of expression that cannot be communicated if minimum distance requirements are imposed. According to plaintiffs, table dancing uses "not just vision but multi-sensory perception to communicate its message through the sounds, smells and movements

of the dancer within the [customer's] intimate perimeter." Plaintiffs' Supplemental Brief at 6. Plaintiffs emphasize in particular the importance of "scents," noting that "[t]he human body may produce some of the most powerful olfactory stimulants of all." *Id.* at 7. Because smell and intimacy are so important to the table dancing experience, plaintiffs argue, close physical distance between the dancer and the patron is essential.

Plaintiffs contend that the erotic dancing permitted by the ordinance is significantly less effective than table dancing in conveying the speaker's erotic message. They contend further that, based on the tipping practices of the nightclub's patrons, it is clear that customers do not view other erotic dancing, nude or otherwise, as an adequate substitute for table dancing. In short, customers tip better for table dancing. The restrictions on table dancing, they argue, will have a negative economic impact on adult nightclubs in Kent, and will make Kent a less attractive venue for this type of entertainment.[3] This, they argue, constitutes an impermissible suppression of protected speech.

As to the economic impact of the ordinance on the plaintiffs, the Ninth Circuit has held that "in the absence of any absolute bar to the market, . . . it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.' " *Spokane Arcade, Inc. v. City of*

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[3] In support of this argument, plaintiffs submit evidence showing that similar ordinances in other cities have had a negative economic impact on adult nightclubs in those cities. *See* Bern Decl. (docket no. 33); Fueston Decl. (docket no. 28).

Spokane, 75 F.3d 663, 666 (9th Cir.1996) (quoting *Topanga Press Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir.1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994)). The ordinance promulgated by the City in this case does not "deny [plaintiffs] the opportunity to operate its establishments, but merely (or rather, allegedly) increase[s] the costs of doing so." *Spokane Arcade* at 666 [sic]. This type of injury "should not inform First Amendment analysis." *Id.* Thus, "even if the costs of compliance were so great that [plaintiffs] would be forced out of business, the ordinance[ ] do[es] not pose any intrinsic limitation on the operation of the [nightclubs]." *Id.* at 667.

As to the [sic] whether the adverse impact of the ordinance on table dancing violates the First Amendment, the Court concludes it does not. Plaintiffs' argument hinges on the proposition that table dancing is so unique that it is entitled to its own separate constitutional analysis. As the Supreme Court stated in *Barnes*, however, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Barnes*, 501 U.S. at 570, 111 S.Ct. at 2462-63. The essential difference between table dancing and stage dancing is, in plaintiffs' own words, "close physical proximity." Thus, plaintiffs' argument, stripped of all its verbiage, is that the customer's experience is more intense, more personal, more erotic if the dancer is close. This is undoubtedly true, but the same could be said of stage dancing and other erotic dancing as a whole. Undoubtedly, the experience of the nightclub patron is significantly enhanced if he or she can be closer to the

nude dancer on stage. The patron can see and hear the dancer more clearly, and has a better opportunity to smell the "breath, perfume and the scent of the body." Plaintiffs' Supplemental Brief at 7. But there is nothing in constitutional jurisprudence to suggest that patrons are entitled under the First Amendment to the maximum erotic experience possible. The government is allowed to impose time, place, and manner restrictions on erotic expression, provided the regulation does not burden substantially more speech than necessary to further the government's legitimate interests. *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758.

The Court accepts as true for purposes of this motion that many customers prefer to be close to the dancers. No doubt many would like to touch the dancers. But close proximity, while more desirable, also enhances the risk of illegal sexual contact, and thus courts have consistently upheld attempts by cities to minimize these risks by imposing distance requirements on erotic dancing. *See, e.g., Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir.1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir.1986). Moreover, the customers' preferences are not the proper focus of the constitutional inquiry. As instructed by the Supreme Court, the crucial question is whether the distance requirement "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798, 109 S.Ct. at 2758.

Plaintiffs argue that the distance requirement is not narrowly tailored because there are less restrictive means of achieving the same result. Plaintiffs argue, for example, that a "no touch" ordinance or one-foot setback would achieve the same result in a less burdensome

manner. But the Supreme Court has flatly rejected the notion that time, place, and manner restrictions violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906. " 'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800, 109 S.Ct. at 2758 (*quoting Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906-07).

The Court is satisfied that the City has a substantial interest in reducing the risk of sexual contact and illegal touching between dancers and their patrons. The Court is also satisfied that the reasonable distance requirement effectively serves that interest.

The remaining question is whether the ordinance burdens "*substantially* more speech than necessary to further the government's interest." *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758 (emphasis added). The plaintiffs' argument that it does is again premised on their belief that there are less restrictive means to achieve the government's goal. That argument must be rejected in light of Ward. Moreover, the argument that a ten-foot distance requirement between dancer and patron burdens substantially more speech than necessary is essentially foreclosed by *Kev*. As the Ninth Circuit stated in *Kev*:

> While the dancers' erotic message might be slightly less effective from ten feet, the ability to

> engage in protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

793 F.2d at 1061.[4]

Here, the ordinance does not prevent the dancers from performing their erotic dance, or limit the manner in which the dancers may express themselves. The ordinance merely requires that the dancer perform the dance at a certain distance from the customer. Nor does the ordinance bar the customer from receiving the erotic message being conveyed. There is no suggestion that, at a distance of ten feet, the customer is unable to see the performance, appreciate its meaning, or satisfy his or her appetite for sexually explicit dance. The ordinance merely diminishes to a limited degree the effectiveness of the erotic message conveyed by the dance; it "does not impair the dancer's ability to display her art." *Kev*, 793 F.2d at 1061 n. 12. As a result, the ordinance does not burden substantially more speech than necessary, and thus is "narrowly tailored" within the meaning of *Ward*. Based on the same reasoning, the Court finds that the

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[4] The Court notes that *Kev* was decided before he [sic] Supreme Court in *Ward* clarified that content-neutral time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the government's goals. The Court did recognize, however, the Supreme Court's holding in *Albertini* that the requirement that an "incidental burden on speech [be] no greater than essential" is met where "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Kev*, 793 F.2d at 1059 n. 3. This is the test later adopted by the Supreme Court in *Ward*. Under this test, the *Kev* court found the ten-foot distance requirement to be constitutional.

ordinance reasonably offers alternative avenues for expression through erotic dance, and thus is a valid time, place, and manner restriction.

The plaintiffs also argue that the ordinance violates the First Amendment because it is overbroad. The Court rejects this argument as without merit. The Court also rejects as meritless the plaintiffs' claim that the ordinance violates their substantive due process rights. There is no basis for finding that the ordinance is arbitrary, capricious, or irrational, or that it is unduly oppressive.

III. *State Constitutional Law Claims*

The Court abstains from ruling on the plaintiffs' state constitutional claims, and hereby dismisses them without prejudice.

IV. *Conclusion*

The Court hereby GRANTS the City of Kent's motion for summary judgment and dismisses all of the plaintiffs' federal law claims with prejudice. The Court dismisses the plaintiffs' state law claims without prejudice. The Clerk is directed to enter judgment in favor of the defendant on the plaintiffs' federal law claims.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK COLACURCIO, JR., dba DDF&S Investment Co.; DAVID EBERT, dba DDF&S Investment Co.; STEVE FUESTON, dba DDF&S Investment Co., Plaintiffs-Appellants, v. CITY OF KENT, Defendant-Appellee.	No. 96-36197 D.C. No. CV-95-01176-TSZ ORDER (Filed Mar. 26, 1999)

Before: HUG, Chief Judge, REINHARDT and WIGGINS, Circuit Judges.

Chief Judge Hug and Judge Wiggins vote to deny the petition for rehearing. Judge Reinhardt votes to grant the petition for rehearing. Chief Judge Hug and Judge Reinhardt vote to reject the suggestion for rehearing en banc. Judge Wiggins recommends rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

CHAPTER 5.10. ADULT ENTERTAINMENT

Sec. 5.10.010. Findings of fact.

Based on public testimony and other evidence and information before it, the city council makes the following findings of fact:

1. The activities defined and regulated in this chapter are detrimental to the public health, safety and general welfare of the citizens of the city and, therefore, such activities must be regulated as provided in this chapter.

2. Regulation of the adult entertainment industry is necessary because, in the absence of such regulation, significant criminal activity has historically and regularly occurred. This history of criminal activity in the adult entertainment industry has included prostitution, narcotics and liquor law violations, breaches of the peace and the presence within the industry of individuals with hidden ownership interests and outstanding arrest warrants.

3. Contact between entertainers and patrons of adult entertainment businesses facilitates prostitution and other related crimes and the concern over unlawful sexual activities and related crimes is a legitimate health concern of the city which demands reasonable regulation of adult entertainment businesses in order to protect the health and well-being of the citizens; and

4. Licensing is a legitimate and reasonable means of accountability to ensure that operators of adult entertainment businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

5. In the absence of regulation, the activities described in this section occur regardless of whether the adult entertainment is presented in conjunction with the sale of alcoholic beverages.

6. It is necessary to license entertainers in the adult entertainment industry to prevent the exploitation of minors, to ensure that each such entertainer is an adult, to ensure that such entertainers have not assumed a false name which would make regulation of the entertainer difficult or impossible and to ensure that such entertainers are not involved in criminal activity.

7. It is necessary to have a licensed manager on the premises of establishments offering adult entertainment at such times as such establishments are offering adult entertainment so that there will, at all necessary times, be an individual responsible for the overall operation of the establishment, including the actions of patrons, entertainers and other employees.

8. The license fees required in this chapter are nominal fees imposed as necessary regulatory measures designed to help defray the substantial expenses incurred by the city in

regulating the adult entertainment industry.

9. Hidden ownership interests for the purposes of skimming profits and avoiding the payment of taxes have historically occurred in the adult entertainment industry in the absence of regulation. These hidden ownership interests have historically been held by organized and white collar crime elements. In order for the city to effectively protect the public health, safety and general welfare of its citizenry, it is important that the city be fully apprised of the actual ownership of adult entertainment establishments.

10. The city council desires to prevent these adverse effects and thereby protect the health, safety, and welfare of the citizenry, protect the citizens from increased crime, preserve the quality of life, preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and

11. It is not the intent of this chapter to suppress any speech activities protected by the First Amendment or Article I, Section 5 of the Washington State Constitution, but to enact content neutral regulations which address the secondary effects of adult entertainment businesses, as well as the health problems associated with such businesses.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.020. Purpose and intent.

It is the purpose of this chapter to regulate adult entertainment businesses and related activities to promote health, safety, morals, and general welfare of the citizens of the City of Kent, and to establish reasonable and uniform regulations to prevent the establishment of adult entertainment business in locations within the city which would have a harmful effect on the residents of the city. The purpose of this chapter is to alleviate undesirable social problems that accompany adult entertainment businesses, and to enact content neutral regulations which address the secondary effects of adult entertainment businesses as well as health problems associated with such business, not to curtail the First Amendment expression, namely dancing or entertainment. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the state or federal constitutions, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimate the distribution of obscene materials.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.030. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them

in this section, except where the context clearly indicates a different meaning:

Adult entertainment means any dance, amusement, show, display, exhibition, pantomime, modeling or any other like performance of any type where such is characterized by the performer's "nudity", as defined herein, or the exhibition of "specified sexual activities," also defined herein, which emphasizes and seeks to arouse or excite the patron's sexual desires for the use or benefit of a member or members of the public or advertised for the use or benefit of a member of the public.

Adult entertainment business means an adult arcade, adult bookstore, adult novelty store, adult video store, adult motion picture theater, and exotic dance studio, more specifically defined as follows:

1. *Adult arcade* means an establishment where, for any form of consideration, one (1) or more still or motion picture projectors, slide projectors, computer generated or enhanced pornography, panorama, peep show, or similar machines, or other image producing machines, for personal viewing, are used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "nudity," or "specified sexual activities."

2. *Adult bookstore, adult novelty store or adult video store* means a commercial establishment which has as a significant or substantial portion of its stock-in-trade or revenues, substantial meaning twenty (20)

percent or more, for any form of consideration, books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other photographic reproductions or visual representations which are characterized by the depiction or description of "nudity" or "specified sexual activities."

a. An establishment may have other principal business purposes that do not involve the offering for sale or rental of materials depicting or describing "nudity" or "specified sexual activities," and still be categorized as adult bookstore, adult novelty store, or adult video store, such other business purposes will not serve to exempt such establishments from being categorized as an adult bookstore, adult novelty store, or adult video store so long as one (1) of its principal business purposes is offering for sale or rental, for some form of consideration, the specified materials which depict or describe "nudity" or "specified sexual activities."

b. Video stores that sell and/or rent only video tapes or other photographic reproductions and associated equipment shall come within this definition. It shall be a rebuttable presumption that twenty (20) percent of a business stock-in-trade or revenues is considered substantial.

3. *Adult motion picture theater* means a commercial establishment where films, motion

pictures, video cassettes, slides, or similar photographic reproductions characterized by the depiction or description of "nudity" or "specified sexual activities" are regularly shown for any form of consideration.

4. *Exotic dance studio,* also known as "topless bar" and "adult cabaret," means a nightclub, bar, restaurant, or similar commercial establishment to which any member of the public is invited or admitted and where an entertainer provides live adult entertainment performances to any member of the public.

City means the City of Kent, Washington.

Clerk means such city employees or agents as the mayor shall designate to administer this chapter, or any designee thereof.

Conviction means an adjudication of conviction of guilt and occurs at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact finding motions, and appeals. Conviction also means a bail forfeiture.

Employee means any and all persons, including managers, entertainers, and independent contractors who work in or at or render any services directly related to the operation of any adult entertainment business offering adult entertainment, whether or not such person is paid compensation by the operator of said business.

Entertainer means any person who provides live adult entertainment in an adult entertainment business

whether or not an employee of the operator and whether or not a fee is charged or accepted for such entertainment.

Establish means and include any of the following:

1. To open or commence any adult entertainment business as a new business; or
2. To convert an existing business, whether or not an adult entertainment business, to any adult entertainment businesses defined herein.
3. To add any of the adult entertainment businesses defined herein to any other existing adult entertainment business; or
4. To relocate any such adult entertainment business.

License means a license to operate, manage or entertain at any premises that is classified as an adult entertainment business.

Licensed premises means any premises that requires a license and that is classified as an adult entertainment business.

Licensee means a person in whose name a license to operate, manage or entertain at an adult entertainment business has been issued, as well as the individual listed as an applicant on the application for a license.

Manager means any person appointed by an owner or operator of an adult entertainment business who manages, directs, administers or is in charge of the affairs and/or the conduct or operation of an adult entertainment business and includes assistant managers.

Materially false representation means any false representation or statement, oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the license application process.

Nude means:

1. Less than completely and opaquely covered or in such attire, costume or clothing as to expose to view male genitals, female genitals, pubic region, buttocks, anus, or any portion of the female breast below a point immediately above the top of areolae; or

2. Wearing any device or covering exposed to view which simulates the appearance of male genitals, female genitals, pubic region, buttocks, anus, or any portion of the female breast below a point immediately above the top of areolae.

Operator means and includes the owner, permit holder, custodian, manager, operator, or person in charge of, conducting or maintaining an adult entertainment business.

Panorama or peep show means any device which, upon insertion of a coin or by any other means, exhibits or displays a picture or view by film, video, or by any other means.

Person means any individual, firm, joint venture, copartnership, association, social club, fraternal organization, corporation, estate, trust business trust, receive or any other group or combination acting as a unit.

Specified sexual activities means and includes any of the following:

1. The caressing, touching, fondling or other intentional or erotic touching of male genitals, female genitals, pubic region, buttocks, anus, or female breasts; or

2. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, flagellation, sodomy, bestiality, or any sexual acts which are prohibited by law; or

3. Masturbation, actual or simulated; or

4. Human genitals in a state of sexual stimulation, arousal or tumescence or visual state of sexual stimulation, arousal or tumescence, even if completely and opaquely covered; or

5. Excretory functions as part of or in connection with any of the activities set forth in subsections 1. through 4. of this subsection.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.040. Administration of licensing.

The clerk is responsible for granting, denying, revoking, renewing, suspending, and cancelling adult entertainment business licenses. The planning director and the building official or their designee are responsible for ascertaining whether a proposed adult entertainment business for which a license is being applied for complies with all building code and land use requirements enumerated herein and all other applicable building code

and zoning laws and/or regulations now in effect or as amended or enacted subsequent to the effective date of this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.050. License required; fee

A. *Adult entertainment business license required.*

1. No person or entity shall use any property or premises for an adult entertainment business within the City of Kent except within those areas authorized for location of said businesses as set forth in Kent City Code 15.08.270, and no adult entertainment business shall be established, operated or maintained in the city unless the owner or operator thereof has obtained an adult entertainment business license from the clerk. It is unlawful for any entertainer, employee or operator to knowingly work in or about or to knowingly perform any service directly related to the operation of an unlicensed public adult entertainment business.

   Violation/penalty. Any violation of the provisions of this subsection shall constitute a misdemeanor as set forth in this chapter.

2. The annual fee for an exotic dance studio business license shall be five hundred dollars ($500.00). This amount shall be used for the cost of administration of this chapter.

3. The annual license fee for all other adult entertainment businesses subject to this

chapter shall be one hundred fifty dollars ($150.00). This amount shall be used for the cost of administration of this chapter.

4. The above-referenced licenses expire annually on December 31 and must be renewed by January 1.

5. The applicant must be eighteen (18) years of age or older.

B. *License for managers and entertainers required.*

1. No person shall work as a manager, assistant manager, or entertainer at an adult entertainment business without having first obtained a manager's or an entertainer's license from the clerk.

   Violation/penalty. It shall be unlawful and a person commits a misdemeanor as set forth in this chapter if he or she acts or performs as a manager or entertainer in an adult entertainment business without said valid and current license.

2. The annual fee for such a license shall be one hundred fifty dollars ($150.00). This amount shall be used for the cost of administration of this chapter.

3. This license expires annually on December 31 and must be renewed by January 1.

4. The applicant must be eighteen (18) years of age or older.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.060. License applications.

A. *Adult entertainment business.* All applications for an adult entertainment business license for places which offer adult entertainment shall be submitted in the name of the person or entity proposing to conduct such adult entertainment on the business premises. All applications for an adult entertainment business license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the city, along with a nonrefundable application processing fee of one hundred fifty dollars ($150.00), which shall contain the following information:

1. Names, any aliases or previous names, driver's license number, if any, business, mailing, and residential address, telephone number, and social security numbers for each individual, partner, corporate officer, director, and other persons holding a significant interest or responsibility for management of the business, specifying the interest or management responsibility of each such individual, partner, corporate officer and/or director for each applicant. For purposes of this section, significant interest shall mean those persons who own ten (10) percent or greater interest in the adult entertainment business.

2. If a partnership, whether general or limited; and if a corporation, date and place of incorporation, evidence that it is in good standing under the laws of Washington, and name and address of any registered agent for service of process.

3. Addresses of the applicant for the five (5) years immediately prior to the date of application.

4. Any and all criminal misdemeanor or felony convictions or forfeitures, other than parking offenses or minor traffic violations, including dates of conviction, nature of the crime, name and location of court and disposition for each individual, partner, corporate officer and/or director identified in subparagraph 1. above.

5. A description of the business, occupation, or employment of the applicant for the three (3) years immediately preceding the date of application.

6. Whether the applicant or any individual, partner, corporate officer, or director identified in subparagraph 1. above has had a previous license under this chapter or other similar ordinances from another city or county denied, suspended, or revoked, including the name and location of the adult entertainment business for which the license was denied, suspended, or revoked, as well as the date of the denial, suspension, or revocation.

7. Whether the applicant or any individual, partner, corporate officer, or director identified in subparagraph 1. above holds any other licenses under this chapter, or other similar adult entertainment business ordinance from another city or county and, if so, the names and locations of such other permitted businesses.

8. The single classification of license for which the applicant is filing.

9. The location of the proposed adult entertainment business, including a legal description of the property, street address, and telephone number(s), if any, together with the name and address of each owner and lessee of the property.

10. Two (2) two-inch by two-inch color photographs of each applicant, taken within six (6) months of the date of the application, showing only the full face of the applicant. The photographs shall be provided at the applicant's expense. Alternatively, the applicant may be required to submit to a photograph taken at the direction of the clerk.

11. Complete sets of fingerprints of each individual, partner, corporate officer, and director on forms prescribed by the chief of police.

12. In the case of an exotic dance studio, a scale drawing or diagram showing the configuration of the premises for the proposed exotic dance studio, including a statement of the total floor space occupied by the business, and marked dimensions of the interior of the premises. Performance areas, seating areas, manager's office and stations, restrooms and service areas shall be clearly marked on the drawing. An application for a license for an exotic dance studio shall include building plans which demonstrate conformance with Kent's Building and Zoning Codes.

13. Authorization for the city, its agents and employees to investigate and seek information to confirm any statements set forth in the application.

14. Supplemental identification and/or information, as requested by the clerk, deemed necessary to confirm statements set forth in the application or determine compliance with this chapter.

B. *Processing adult entertainment business license applications.*

1. Upon receipt of the complete application and fee, the clerk shall provide copies to the police, planning and other applicable departments for their investigation and review to determine compliance of the proposed adult entertainment business with the laws and regulations which each department administers. Each department shall, within thirty (30) days, report to the clerk whether such application and premises complies with the laws administered by each department. No license may be issued unless each department reports that the application and premises comply with the relevant laws. A department shall recommend denial of a license under this subsection if it finds that the proposed adult entertainment business is not in conformance with the requirements of any provisions of any applicable statute, code, ordinance, regulation or other law in effect in the city. A recommendation for denial shall be in writing and cite the specific reasons therefor, including applicable laws.

2. An adult entertainment business license shall be issued by the clerk within thirty (30) days of the date of filing a complete license application and fee, unless the clerk determines that the applicant has failed to meet any of the requirements of this chapter or provide any information required under this subsection, or that the applicant has made a false misleading or fraudulent statement of material fact on the application for a license, or in any report or records required to be filed with the clerk. In the event the clerk determines or learns at any time that the applicant has improperly completed the application for a proposed adult entertainment business license, he/she may grant an extension of time in which to supply the required information. (The time period for granting or denying a permit shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.) If the clerk finds that the applicant has failed to meet any of the requirements for issuance of an adult entertainment license, the clerk shall deny the application in writing, and shall cite, in writing, the specific reasons therefor, including applicable laws. If the clerk fails to issue or deny the application within thirty (30) days of the date of filing of a complete application and fee, the applicant may, subject to all other applicable laws, operate the business for which the license was sought until notified by the clerk that the license has been denied.

C. *Manager or entertainer license.* A separate license shall be obtained for each and every establishment at which the manager applicant will manage or the entertainer applicant will entertain. All applications for a manager's or entertainer's license shall be signed by the applicant and notarized or certified to be true under penalty of perjury. All applications shall be submitted on a form supplied by the city, along with a nonrefundable application processing fee of one hundred dollars ($100.00), which shall contain the following information:

1. The applicant's name, home address, home telephone number, date and place of birth, driver's license number, if any, social security number and for entertainers, any stage names or nicknames used in entertaining.

2. The name and address of each business at which the applicant intends to work.

3. Documentation that the applicant has attained the age of eighteen (18) years. Any of the following shall be accepted as documentation of age:

    a. A motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth; or

    b. A state issued identification card bearing the applicant's photograph and date of birth.

    c. An official passport issued by the United States of America.

    d. An immigration card issued by the United States of America.

e. Any other picture identification that the city determines to be acceptable.

4. A complete statement of all convictions of the applicant for any misdemeanor or felony violations in this or any other city, county or state, except parking violations or minor traffic infractions.

5. A description of the applicant's principal activities or service to be rendered.

6. Resident addresses and telephone numbers for five (5) years immediately prior to the date of application specifying the period of residence at each address.

7. The names and addresses of employers or individuals or businesses for whom the applicant was an employee or independent contractor for the three-year period immediately prior to the date of application, including the period of employment.

8. Two (2) two-inch by two-inch color photographs of each applicant, taken within six (6) months of the date of the application, showing only the full face of the applicant. The photographs shall be provided at the applicant's expense. Alternatively, the applicant may be required to submit to a photograph taken at the direction of the clerk.

9. Complete sets of fingerprints of each manager and entertainer on forms prescribed by the chief of police.

10. Authorization for the city, its agents and employees to investigate and seek information to confirm any statements set forth in the application.

11. Supplemental identification and/or information, as requested by the clerk, deemed necessary to confirm any information set forth in the application or to determine compliance with this chapter.

D. *Processing managers or entertainers license applications.* A copy of the application shall be provided to the police and other applicable departments for its review, investigation and recommendation. An adult entertainment business manager's or an adult entertainer's license shall be issued by the clerk within fourteen (14) days from the date the complete application and fee were received unless the clerk determines that the applicant has failed to provide any information required to be supplied according to this chapter, or that the applicant has made any false, misleading or fraudulent statement of material fact in the application for a license. In the event the clerk determines or learns at any time that the applicant has improperly completed the application for issuance of a managers or entertainers license, he/she may grant an extension of time in which to supply the required information. (The time period for granting or denying a license shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the applicant.) If the clerk determines that the applicant has failed to meet any of the requirements for issuance of a managers or entertainers license, the clerk shall deny the application in writing and shall cite

the specific reasons therefor, including applicable laws. An applicant for an adult entertainment manager's or entertainer's license shall be issued a temporary license upon receipt of a complete license application and fee. Said temporary license will automatically expire on the fourteenth day (or on such day established pursuant to any extension granted herein) following the filing of a complete application and fee, unless the clerk has failed to approve or deny the license application, in which case the temporary license shall be valid until the clerk approves or denies the application, or until the final determination of any appeal from a denial of the application.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.070. Issuance of licenses.

Upon completion of the investigation and review by the departments, a review of the recommendations and verifications, and a determination that all matters contained in the application are true and correct and that this chapter has been complied with, the clerk shall issue such license applied for in accordance with the provisions of this chapter. The applicable license fee, together with any delinquent fees that may then be due shall first be paid to the city.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.080. Denial of application for licenses.

The clerk shall deny the application to:

1. An applicant who is under eighteen (18) years of age.

2. An applicant who is overdue on his/her payment to the city of taxes, fees, fines, or penalties assessed against him/her or imposed upon him/her in relation to an adult entertainment business.

3. An applicant whose place of business is conducted by an agent, unless such agent possesses the same qualifications required of the licensee, or in the case of a manager of an adult entertainment business, the manager has obtained a manager's license.

4. A partnership, unless all the members thereof are qualified to obtain a license as provided in this chapter. Such license shall be issued to the manager or agent of said partnership.

5. A corporation, unless all the officers and directors thereof are qualified to obtain a license as provided herein. Such license shall be issued to the manager or agent of said corporation.

6. An applicant who has failed to provide information required on a license application for the issuance of the license or has made, with the intent to mislead, a materially false representation in the application for a license under this chapter which the applicant knows to be false.

7. The applicant has failed to comply with any provision or requirement of this chapter.

8. An applicant having an interest in any license granted under this chapter revoked within six (6) months from the date of application.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.090. License term; renewals.

A. There shall be no prorating of the license fees for licenses required pursuant to this chapter, and all such licenses shall expire on the thirty-first day of December of each year, except that in the event that the original application is made subsequent to June 30, then one-half of the annual fee may be accepted for the remainder of said year.

B. Application for renewal of licenses issued hereunder shall be made to the clerk no later than thirty (30) days prior to the expiration of adult entertainment business licenses and managers and entertainers business licenses. The renewal license shall be issued in the same manner an on payment of the same fees as for an original application under his [sic] chapter. All applicants for a license renewal shall present their current license for verification of identity, and upon issuance of a renewed license, shall surrender the expiring license to the clerk. There shall be assessed and collected by the clerk, an additional charge of twenty-five (25) percent of the license fee, on applications not made on or before said date.

C. The clerk shall renew a license upon application unless the clerk is aware of facts that would disqualify the applicant from being issued the license for which he or she seeks renewal, and further provided that the application complies with all provisions of this chapter as now enacted or as the same may hereafter be amended.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.100. Other license requirements.

A. *Duty to supplement.*

1. Applicants for a license under this chapter shall have a continuing duty to promptly supplement application information required in the event that said information changes in any way from what is stated on the application. If any person or entity acquired, subsequent to the issuance of an adult entertainment business license for places offering adult entertainment, an interest in the licensed premises or the licensed business, immediate notice of such acquisition shall be provided in writing to the clerk. The notice shall include the information required to be provided for the original adult entertainment business. The failure to supplement the application on file with the clerk regarding such change in ownership or interest, within thirty (30) days from the date of such change, shall be grounds for suspension or revocation of a license.

2. The applicant must be qualified according to the provisions of this section and the premises must be inspected and found to be in

compliance with health, fire, and building codes of the city.

3. The fact that a person possesses other types of state or city permits and/or licenses does not exempt him/her from the requirement of obtaining an adult entertainment business.

B. *Manager on premises.* A licensed manager shall be on duty on tee [sic] premises of an adult business at all times that adult entertainment is being provided.

C. *License nontransferable.* No license or permit issued pursuant to this chapter shall be assignable or transferable. For purposes of this, chapter, "assignable" or "transferable" shall mean and include any of the following:

1. The sale, lease or sublease of the business; or

2. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

3. The establishment of a trust, gift or other similar legal devise which transfers the ownership or control of the business, except for transfer by bequest or other operation of law.

D. *Name of business and place of business.* No person granted a license pursuant to this chapter shall operate the adult entertainment business under a name not specified in the license, nor shall he or she conduct business under any designation or location not specified in the license.

E. *License; posting and display.*

1. The adult entertainment business license, if granted, shall state on its face the name of the person or persons to whom it is issued, the expiration date, and the address of the licensed adult entertainment business. The license shall be posted in a conspicuous place at or near the entrance to the licensed premises so that it can be easily read at any time the business is open.

2. The license of the manager on duty shall be prominently posted during business hours.

3. Entertainer licenses need not be posted, but must be available on the premises when the entertainer is on the premises, for immediate inspection by any city official or law enforcement agency having jurisdiction.

4. Violation/penalty. Any violation of the provisions of this subsection is a misdemeanor as set forth in this chapter.

F. *Inspection of licenses.* The manager shall, upon request by any law enforcement officer or inspector, make available for inspection the entertainer licenses required to be on the premises as described herein.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.110. Specifications; exotic dance studios.

A. *Separation of adult entertainment performance area.* The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-

four (24) inches in elevation above the level of the patron seating areas. The stage(s) must be visible from the common areas of the premises and at least one (1) manager's station.

B. *Lighting.* Sufficient lighting shall be provided and equally distributed in and about the parts of the premises which are open to and used by patrons so that all objects are plainly visible at all times, and shall be illuminated so that patrons, on any part of the premises open to the public, shall be able to read a program, menu, or list printed in eight (8) point type.

C. *Visibility.* Neither the performance nor any photograph, drawing, sketch or other pictorial or graphic representation thereof displaying nudity may be visible outside the premises of the adult entertainment business.

D. *Submittal of plans.* Building plans showing conformance with the requirements of this section shall be included with any application for an exotic dance studio business license.

E. *Signs.* Signs of sufficient size to be readable at twenty (20) feet shall be conspicuously displayed in the public area of the establishment stating the following:

THIS ADULT ENTERTAINMENT ESTABLISHMENT IS REGULATED BY THE CITY OF KENT. ENTERTAINERS ARE:

(A) Not permitted to engage in any type of sexual conduct;

(B) Not permitted to appear nude, except on stage;

(C) Not permitted to solicit or demand or to directly accept, or receive any gratuity or other payment from a patron.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.120. Standards of conduct and operation applicable to exotic dance studios.

A. *Standards for patrons, employees and entertainers.* The following standards of conduct must be adhered to by patrons, entertainers and/or employees of exotic dance studios at all times adult entertainment is performed.

1. Admission to exotic dance studios under this section shall be restricted to persons of the age of eighteen (18) years or more.

2. All dancing and adult entertainment by an entertainer shall occur on the entertainment performance areas intended for that purpose described in section 5.10.110 A.

3. No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron.

4. No patron or customer shall go into or upon the adult entertainment performance area described in section 5.10.110 A. above while adult entertainment is being performed.

5. No employee or entertainer shall be nude or shall entertain while nude except on the entertainment performance area described in subsection 5.10.110 A.

6. No member of the public or employee or entertainer shall allow, encourage, or knowingly permit any person upon the premises to touch, caress, or fondle the breast, buttocks, anus, pubic area, or genitals of any other person.

7. No member of the public or employee or entertainer shall allow, encourage, or permit physical contact between an employee or entertainer and any member of the public, which contact is intended to arouse or excite sexual desires.

8. No employee or entertainer shall perform acts in a lewd or obscene fashion or perform acts of or acts which simulate:

   a. Specified sexual activities as defined in this chapter; or

   b. The touching, caressing or fondling of the breasts, buttocks or genitals.

9. No entertainer employed or otherwise working at an exotic dance studio shall solicit any gratuity or other payment from a patron or customer.

10. No customer or patron of an adult entertainment business shall directly pay or give any gratuity or other payment to any entertainer.

11. It is unlawful for any entertainer, manager, employee, or wait person to perform more than (1) such function at an exotic dance studios [sic] on the same business day.

12. It is unlawful for any entertainer to use any stage name or nickname not listed in the application for entertainers license.

13. No exotic dance studio licensee shall employ as an entertainer a person under the age of eighteen (18) years or a person not licensed pursuant to this chapter.

14. No exotic dance studio licensee shall service, sell, distribute, or suffer the consumption or possession of any intoxicating liquor or controlled substance upon the premises of the licensee.

B. The responsibilities of the manager of an exotic dance studio shall include but are not limited to:

1. A licensed manager shall be on duty at an exotic dance studio at all times adult entertainment is being provided or members of the public are present on the premises. The name and license of the manager shall be prominently posted during business hours. Managers shall be required to verify and ensure that entertainers possess a current and valid entertainer license availabe for immediate inspection on the premises.

2. The licensed manager on duty shall not be an entertainer.

3. The manager licensed under this chapter shall maintain visual observation of each member of the public at all times any entertainer is present in the public or performance area of the exotic dance studio. Where there is more than one (1) performance area, or the performance area is of such size or configuration that one (1) manager or assistant manager is unable to visually observe, at all times, each adult entertainer, each employee, and each member of the public, a manager or assistant

manager licensed under this chapter shall be provided for each public or performance area or portion of a public or performance are a visually separated from other portions of the exotic dance studio.

4. The manager shall be responsible for and shall assure that the actions of members of the public, the adult entertainers and all other employees shall comply with the dress code and conduct set forth in section 5.10.120 and all other requirements of this chapter.

C. Violation/penalty. Any violation of the provisions of this section by a patron, owner, operator, manager, or any employee is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.130. Regulations applicable to adult arcades.

All adult arcades shall comply with the following additional regulations:

1. *Construction/maintenance.*

   a. The interior of the show premises shall be arranged in such a manner as to insure that customers are fully visible from the waist down, and all persons viewing such panorama pictures shall be visible from the common areas of such premises.

   b. The licensee shall not permit any doors to public areas on the premises to be locked during business hours.

c. Any room or area on such premises shall be readily accessible at all times for inspection by any law enforcement officer or license inspector.

d. The licensee shall maintain, at a minimum, illumination as required in this chapter for exotic dance studios generally distributed in all parts of the premises at all times when the facility is open or when the public is permitted to enter or remain therein.

2. *Standards of conduct.*

a. No patron shall be unclothed or in such attire, costume or clothing so as to be in a state of nudity or engage in any specified sexual activity and no owner or manager shall knowingly allow such conduct.

b. No more than one (1) patron at a time shall be present in a booth, cubicle, room, or stall wherein adult entertainment is provided is visible.

c. Violation/penalty. Any violation of the provisions of this subsection by a patron, owner, operator, manager, or any employee is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.140. Regulations applicable to book stores, video stores and other businesses not qualifying as adult entertainment businesses.

A. Book stores, video stores, and other businesses that sell or otherwise distribute books, magazines, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of nudity or specified sexual activities, and less than twenty (20) percent of their stock-in-trade or revenues comes from the rental or sale of such items shall be subject to the following regulations:

1. All such items as are described above shall be physically segregated and closed off from other portions of the store such that these items are not visible and/or accessible from other portions of the store.

2. No advertising for such items, shall be posted or otherwise visible, except where such items are authorized for display.

3. Signs readable at a distance of twenty (20) feet shall be posted at the entrance to the area where such items are displayed stating that persons under the age of eighteen (18) are not allowed access to the area where such items are displayed.

4. The manager or attendant shall take responsible steps to monitor the area where such items are displayed to insure that persons under eighteen (18) years of age do not access the age-restricted area.

5. Employees of such businesses shall check identification of persons appearing to be

eighteen (18) or under to insure that such items are not rented or sold to persons under the age of eighteen (18).

B. Violation/penalty. Rental or sale of obscene material (as defined by state law) or material harmful to minors (as defined by state law) to persons under eighteen (18) years of age is prohibited. Any violation of the provisions of this subsection by an owner, operator or manager of an adult entertainment business is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.150. Exemptions.

A. This chapter shall not be construed to prohibit:

1. Plays, operas, musicals, or other dramatic works which are not obscene;

2. Classes, seminars and lectures held for serious scientific or educational purposes; or

3. Exhibitions or dances which are not obscene.

B. For purposes of this chapter, an activity is obscene if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations according to city community standards of:

   a. Ultimate sexual acts, normal or perverted, actual or simulated; or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

C. For purposes of this chapter, an activity is dramatic if the activity is of, related to, devoted to, or concerned specifically or professionally with current drama or the contemporary theater.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.160. Record keeping requirements.

A. All licenses, papers, records, and things required to be kept pursuant to this chapter shall be open to inspection by the clerk during the hours when the licensed premises are open for business, upon two (2) days' written notice. The purpose of such inspections shall be to determine whether the licenses, papers, and things meet the requirements of this chapter.

B. Each adult entertainment business shall maintain and retain for a period of two (2) years the name, address, and age of each person employed or otherwise retained or allowed to perform on the premises as an adult entertainer, including independent contractors and employees. This information shall be open to inspection by the clerk during hours of operation of the business upon twenty-four (24) hours notice to the licensee.

C. No later than March 1 of each year an erotic dance studio licensee shall file a verified report with the clerk showing the licensee's gross receipts and amounts paid to entertainers for the preceding calendar year.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.170 Inspections.

In order to insure compliance with this chapter, all areas of licensed adult entertainment businesses which are open to members of the public shall be open to inspection by city agents and employees during the hours when the premises are open for business. The purpose of such inspections shall be to determine if the licensed premises are operated in accordance with the requirements of this chapter. It is hereby expressly declared that unannounced inspections are necessary to insure compliance with this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.180. Hours of operation.

It is unlawful for any adult entertainment business premises, to be conducted, operated, or otherwise open to the public between the hours of 2:00 a.m. and 10:00 a.m.

Violation/penalty. Any violation of the provisions of this section by the owner, operator or manager of an adult entertainment business is a misdemeanor as set forth in this chapter.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.190 Appeal of license denial; hearing.

A. *Notice.* Any person aggrieved by the action of the clerk in refusing to issue or renew any license issued under this chapter shall have the right to appeal such action to the hearing examiner by filing a notice of appeal with the clerk within ten (10) days of notice of the refusal to issue or renew. Such appeal shall be processed pursuant to the hearing procedures set forth in chapter 2.32 of the Kent City Code. The hearing examiner shall set a date for hearing such appeal, to take place within forty-five (45) days of the date of receipt of the notice of appeal unless such time is extended by mutual consent. At such hearing the appellant and other interested persons may appeal and be heard, subject to results and regulations of the hearing examiner.

B. *Final administrative review.* Appeal to the hearing examiner shall constitute final administrative review.

C. *Appeal to superior court.* An appeal of the decision of the hearing examiner must be filed with superior court within thirty (30) calendar days from the date the hearing examiner's decision was personally served upon or was mailed to the person to whom the notice of civil violation was directed, or is thereafter barred.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.200. License suspension and revocation; hearing.

A. *Grounds.* The, clerk, upon the recommendation of the chief of police or other city official responsible for administering laws and regulations pertaining to any

license issue under this chapter, or his/her designee, may suspend or revoke any license issued under the provisions of this chapter at any time where the same was procured by fraud or through a materially false representation of fact; or for the violation of, or failure to comply with, the provisions of this chapter or any other similar local or state law by the licensee or any of his/her servants, agents or employees; or the conviction of the licensee, or any of his or her servants, agents, or employees, of any crime or offense involving prostitution, promoting prostitution, sexual crimes against children, sexual abuse, rape, distribution of obscenity or material harmful to minors, or transactions involving controlled substances (as that term is defined in RCW Chapter 69.50) committed on the premises of the adult entertainment business.

B. *Suspension and revocation.* A license procured by fraud or misrepresentation shall be revoked. Where other violations of this chapter or other applicable ordinances, statutes or regulations are found, the license shall be suspended for a period of thirty (30) days upon the first such violation, ninety (90) days upon the second violation within a twenty-four-month period, and revoked for third and subsequent violations within a twenty-four-month period, not including periods of suspension; except that where the city building official or fire marshall or their designees or the King County Health Department find that any condition exists upon the premises of an adult entertainment business which constitutes a threat of immediate serious injury or damage to persons or property, said official may immediately suspend any license issued under this chapter pending a hearing in

accordance with section 5.10.190 above. The official shall issue notice setting for the basis of that action and the facts that constitute a threat of immediate serious injury or damage to persons or property.

C. *Notice.* The clerk shall provide at least ten (10) days prior written notice to the licensee of the decision to suspend or revoke the license. Such notice shall inform the licensee of the right to appeal the decision to the hearing examiner and shall state the effective date of such revocation or suspension and the grounds for revocation or suspension. Such appeal shall be processed pursuant to the hearing procedures set forth in chapter 2.32 of the Kent City Code. The hearing examiner shall set a date for hearing such appeal, to take place within forty-five (45) days of the date of receipt of the notice of appeal unless such time is extended by mutual consent. At such hearing the appellant and other interested persons may appear and be heard, subject to rules and regulations of the hearing examiner. The decision of the clerk shall be stayed during the pendency of any appeal except as provided in subsection E. below.

D. *Final administrative review.* Appeal to the hearing examiner shall constitute final administrative review.

E. *Appeal to superior court.* An appeal of the decision of the hearing examiner must be filed with the superior court within thirty (30) calendar days from the date the hearing examiner's decision was personally served upon or was mailed to the person to whom the notice of suspension or revocation was directed, or is thereafter barred.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.210. Nuisance declared.

A. *Public nuisance.* Any adult entertainment business operated, conducted, or maintained in violation of this chapter or any law of the City of Kent or the State of Washington shall be, and the same is, declared to be unlawful and a public nuisance. The city attorney may, in addition to or in lieu of any other remedies set forth in this chapter, commence an action to enjoin, remove or abate such nuisance in the manner provided by law and shall take such other steps and apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such public nuisance, and restrain and enjoin any person from operating, conducting or maintaining an adult entertainment business contrary to the provisions of this chapter.

B. *Moral nuisance.* Any adult entertainment business operated, conducted or maintained contrary to the provisions of RCW Chapter 7.48A, moral nuisance, shall be, and the same is declared to be, unlawful and a public and moral nuisance and the city attorney may, in addition to or in lieu of any other remedies set forth herein, commence an action or actions, to abate, remove and enjoin such public and moral nuisance, or impose a civil penalty, in the manner provided by RCW Chapter 7.48A.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.220. Limitation of liability.

None of the provisions of this chapter are intended to create a cause of action or provide the basis for a claim

against the city, its officials, or employees for the performance or the failure to perform a duty or obligation running to a specific individual or specific individuals. Any duty or obligation created herein is intended to be a general duty or obligation running in favor of the general public.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.230. Violation; penalty; misdemeanor.

In addition to other remedies provided for in this chapter, any person violating any of the provisions of this chapter constituting a misdemeanor shall, upon conviction, be punished by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for not more than ninety (90) days, or by both such fine and imprisonment, and each and every day during which any violation is committed, continued or permitted shall be deemed a separate offense; provided, no person shall be deemed guilty of any violation of this chapter if acting in an investigative capacity pursuant to the request or order of the police chief or prosecuting attorney or duly appointed agent thereof.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.240. Additional enforcement.

The remedies found in this chapter are not exclusive, and, the city may seek any other legal or equitable relief, including but not limited to enjoining any acts or practices which constitute or will constitute a violation of any

business license ordinance or other regulations herein adopted.

(Ord. No. 3214, § 1, 3-7-95)

Sec. 5.10.250. Severability.

If any section, sentence, clause or phrase of this chapter should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this chapter. Any ordinance or regulation in conflict with this chapter is hereby repealed.

(Ord. No. 3214, § 1, 3-7-95)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

FRANK COLACURCIO, *et. al.* Plaintiffs v. THE CITY OF KENT Defendant.	Case No. C95-1176 DECLARATION OF R. BRUCE McLAUGHLIN

I, ROBERT BRUCE McLAUGHLIN, of the City of Indian Rocks Beach, Pinellas County, Florida, DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF STATE OF WASHINGTON

I. BACKGROUND

1. I am in practice as a land use planning Consultant and local government Consultant in the States of Florida, Washington, and elsewhere in the United States.

2. I have a Masters of Science degree in Urban and Regional Planning with a thesis on intergovernmental relationships in the planning process and an undergraduate degree in Political Science with a thesis on American Constitutional Law.

3. I am a member of the American Institute of Certified Planners and of the Canadian Institute of Planners.

4. My credentials as a local government Constitution and land use planner have been accepted by local governments on many occasions in the past.

5. I have been qualified as an expert witness in local government issues and land use planning before the United States District Court for the Middle District of Florida, Jacksonville, Fort Myers, Ocala, Orlando, and Tampa Divisions; the United States Bankruptcy Court for the Middle District of Florida, Tampa Division; the Superior Court of the State of Washington, in and for the Counties of King and Snohomish; and the Hearing Examiner for Snohomish County, Washington; the Circuit Courts for various counties in the State of Florida; the County Courts for Hillsborough and Pinellas Counties; the District Court in and for Stearns County, Minnesota; the Circuit Court in and for Jackson County, Missouri; and the District Court in and for Clark County, Nevada. When I have been qualified as an expert witness, it has often been on the issues of the record supporting various enactments, including the alleged adverse secondary effects of Adult Uses and/or the issue of alternative avenues of communication for Adult Uses and other Adult Use related issues. In addition, I have been qualified as an expert witness with regard to other land use issues such as Comprehensive Planning, Zoning, demographics and the like.

6. I am and have previously been retained as a professional land use planner in Kent, various cities and counties in the States of Florida and Washington, and in the States of Georgia, Hawaii, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, South

Carolina, Tennessee, Texas and Washington, and elsewhere, by various local governments and/or by other private entities who have interests in land or businesses in the respective jurisdictions.

7. I was appointed by the Board of County Commissioners of Hillsborough County, Florida, as a Zoning Hearing Master, to make recommendations with respect to applications for amendments to the Hillsborough County Zoning Code, applications for conditional uses, and Developments of Regional Impact, and to reach Conclusions of Law and to make Findings of Fact and Findings of Consistency or Inconsistency with the Comprehensive Plan with respect to these applications. See Laws of Florida, 1983, C. 83-416.

8. I have been approved by the Florida Department of Administrative Hearings as a non-attorney Petitioner's representative in a Comprehensive Plan consistency challenge.

9. I have been engaged extensively in work involving the review of government actions, and the documentation thereof, including procedures followed for enactment, notices given, referrals made, the substance of the enactment, and the like.

10. In particular, I have previously been retained to research zoning and other ordinances and statutes governing Adult Uses; to conduct an independent analysis, and to testify about those Ordinances with respect to:

a) the nature of the legislation;

b) the methods employed in their enactment;

c) the contents and import of the record;

d) whether or not the legislation has a reasonable predicate, *i.e.* whether the perceived evil which the government allegedly seeks to address is actually engendered by the activity sought to be regulated so that the regulation furthers a substantial governmental interest, and is thus not arbitrary and capricious, either as applied, or facially.

11. I have also frequently been retained to make public records requests of local governments, and to follow-up those requests as necessary.

12. I have been retained by operators of other Adult Uses in Alachua, Brevard, Broward, Citrus, Duval, Hillsborough, Leon, Pasco, Pinellas and St. Johns' Counties, Florida, and in Washington, Georgia, Hawaii, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, South Carolina, Tennessee, and Texas to offer professional planning services related to Licensing and Zoning Regulations and other legislation affecting Adult Uses.

13. I have been retained on behalf of Plaintiffs herein to offer professional local government consulting services with respect to conducting a review of the record of the adoption of Ordinance 3214 as amended by Ordinance 3221, (hereinafter "the Ordinances",) and to review and to express an opinion on, the legislative history of the Ordinances, and the City's purposes in adopting the Ordinances, as indicated by that history.

14. I have personally done or supervised the work described in this Declaration.

15. Accordingly, as set forth herein, I have personal knowledge of the matters hereinafter set forth, and I am competent to make this Declaration, and to offer the opinions herein expressed, and would be competent to testify regarding these expert opinions if called to testify at trial.

16. In this matter, for this Declaration, I have been asked to:

a) review the predicates to the enactment of the Ordinances, and determine whether:

   i) from a factual standpoint, based on the totality of the legislative history record, the Ordinances had as a predominant purpose, the suppression of free speech, and,

   ii) in particular, whether the legislative history of the Ordinances reflects a predominant purpose other than to prohibit and mitigate the alleged adverse effects of exotic dance studios.

   iii) whether there was anything produced in the record before the governing body upon which it could reasonably rely including evidence that such primary and secondary effects were engendered by the types of businesses exemplified by Plaintiffs' proposed exotic dance studio; and whether the legislation at issue could act to ameliorate such effects.

II. MATERIALS REVIEWED

17. I have reviewed the entire set of documents provided by the City, except those documents directly related to the previous litigation, and those related to litigation involving the City of Federal Way. These documents were obtained through requests for production made by Plaintiffs' counsel, and a limited amount of other material was obtained through public records requests made on my behalf pursuant to RCW 42.17, *et.seq.* and through other research endeavors undertaken on my instructions. This latter material, while providing useful background, is not reflected in this my Declaration.

18. Additional material was requested pursuant to RCW 42.17, but with the exception of a small amount of material, the City has refused to honor theses [sic] requests. Much of the material sought pursuant to RCW 42.17 the City failed to provide through discovery, and refused to provide as required by RCW 42.17, *et.seq.* Included in these materials are complete versions of tapes and minutes,[1] of which partial versions have been supplied, and other background materials, all of which are a matter of public record.

19. Because of the overwhelming weight of the evidence in the legislative history already provided, and the almost total lack of contradictory evidence, I do not anticipate that, when and if additional materials are provided, they will change the opinions herein expressed.

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[1] The minutes would have been especially useful in identifying speakers, particularly on the audio tapes.

III. CHRONOLOGY

20. Based on the material I have reviewed, I have prepared a detailed chronology of relevant events, which chronology, which chronology establishes the following key events:

a) *8/11/94* – Settlement Agreement entered between Plaintiffs and City;

b) *8/16/94* – Letter from Ms. Hackett to the Mayor: "I don't want nude dancing in Kent."

c) *9/13/94* – City begins to obtain samples of other Adult Use Zoning and Licensing Ordinances;

d) *9/15/94* – City receives I.R.S. material related to status of entertainers as independent contractors;

e) *9/20/94* – Emergency Zoning Moratorium Adopted, City Council discussion of more restrictive Licensing Ordinance;

f) *9/21/94* – Mayor answers Ms. Hackett's letter: "Members of the City Council and I agree with you wholeheartedly."

g) *10/4/94* – Public Hearing on Moratorium Ordinance;

h) *1/23/95* – First Planning Commission meeting to discuss Zoning Amendment;

i) *2/25/95* – City Council Operations Committee discusses new Licensing Ordinance, also discussion of Zoning Regulations;

j) *2/27/95* – First Planning Commission Public Hearing on Zoning Amendment;

k) *3/7/95* – City Council Public Hearing on, and adoption of, new Licensing Ordinance, also discussion of Zoning Regulations;

l) *3/21/95* – City Council Planning Committee meeting discusses Adult Use Zoning Amendment, Moratorium extended by City Council, and discussion of Licensing Regulations;

m) *3/27/95* – Second Planning Commission hearing on Zoning Amendment;

n) *4/4/95* – City Council Public Hearing on Moratorium extension, Licensing-related findings included;

o) *4/10/95* – City Council Planning Committee meeting on Zoning Amendment, also discussion of Licensing Ordinance;

p) *4/10/95* – Planning Commission Workshop on Zoning Amendment;

q) *4/12/95* – City Council Operations Committee meeting on Amendments to Licensing Ordinance;

r) *4/18/95* – City Council Public Hearing on Licensing Ordinance Amendments;

s) *4/24/95* – Continued Planning Commission Public Hearing on Zoning Amendment;

t) *5/2/95* – City Council discussion of Zoning Amendments;

u) *5/16/95* – City Council Planning Committee meeting on Zoning Amendments;

v) *9/5/95* – City Council Planning Committee meeting on Zoning Amendments;

w) *9/5/95* – City Council sets date for Public Hearing on Moratorium extension;

x) *9/19/95* – City Council Public Hearing on Moratorium extension, also discussion of Licensing Ordinance;

y) *10/3/95* – City Council Planning Committee meeting on Zoning Amendment;

z) 11/7/95 – City Council Planning Committee meeting on Zoning Amendment;

aa) *11/21/95* – City Council Planning Committee meeting on Zoning Amendment, also discussion of licensing Ordinance;

bb) *12/19/95* – City Council meeting on Zoning Amendment, Amendment defeated, also references to Licensing Ordinance;

cc) 1/2/96 – City Council meeting on Zoning Amendment, also discussion of Licensing Ordinance.

21. As noted in the above summary chronology, while many meetings were scheduled to consider either Licensing or Zoning Regulations, many of those meetings ended up including, if not discussions, at least references to the other type of regulation.

22. Key quotations from the above meetings are found in Section IV of this my Declaration, *infra*.

IV. LEGISLATIVE HISTORY EXCERPTS DEMONSTRATING THE PREDOMINANT PURPOSE OF THE ORDINANCES[2]

23. There are numerous direct quotations in the legislative history of the Ordinances, as well as in previous deliberations by the City Council, showing the predominant purpose of the City in passing the Ordinance. I personally listened to audio tapes, and watched and listened to video tapes provided to me by Plaintiff's counsel, which he obtained through discovery. The following excerpts from audio tapes and video tapes are true and correct transcriptions to the extent that the tapes were audible.

24. As set out in Part V. A., *infra*, the City has exhibited a pattern of reacting to proposals to establish exotic dance studios with new and more restrictive regulations. The predominant purpose of such regulations was established in 1988 when there was the following exchange between a Pastor of a church, and the then Mayor, joined later by the City Administrator and another member of City Council, White, (now the Mayor):

> Pastor: "I would certainly urge the council to begin work in drafting the ordinances that are necessary to eliminate the desirability of those

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[2] Except with respect to City Council meeting of 5/3/88, for which an actual transcript was available, quotes and summaries from City Council, Committee and Planning Commission meetings are based on "rough verbatim transcripts" prepared by the Declarant.

people who want to put in those kinds of establishments.

Mayor: . . . "I don't think you're going to have much disagreement from council members. They're going to be looking for whatever type of strategies are effective to address this concern.[3]

" . . . One of the things that we can do is adopt regulations that can address how a business of this type would have to operate. The kinds of regulations that they would have to comply with in order to conduct that business. And those regulations can be quite stringent in terms of the types of organizational structure and that sort of thing that they would have to impose in order to conduct their business."[4]

" . . . that the City Attorney be directed to investigate ways of preventing the location of any exotic dancing establishment in the proposed area, and the matter be referred to the Public Safety Committee."[5]

"I think it's the feeling of the Council and the motion before us that we do everything legally that we can do as a city to block this establishment. . . . "[6]

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[3] Transcript, City Council Public Hearing, 5/3/88, pp. 11 - 12.

[4] *Ibid.*, pp. 24 - 25.

[5] *Ibid.*, pp. 26 - 27.

[6] *Ibid.*, p. 46.

25. The motion was amended to apply to all of the City and carried, thereby continuing the pattern of adopting new Ordinances whenever exotic dance studio are proposed or allegedly become problematic.

26. The predominant purpose of the Ordinances at issue herein was further evident in now Mayor White's anticipatory comments about the Ordinances:

> " . . . research that our legal staff is doing in regards to the business license criteria may well give us that opportunity to discuss this in Court because I think what we will be bringing back to you is something which will be very strict and these businesses may not want to operate in the City of Kent and may well challenge what we may propose, so we may get our day in court."[7]

27. Subsequently, the City received a letter from a Ms. M. D. Hackett, who stated:

"I don't want nude dancing in Kent."

To which Mayor White responded:

> "Members of City Council and I agree with you wholeheartedly."[8]

28. The impetus for the City's adoption of the Ordinances is clearly established in their legislative history:

> "As you know, this is an Ordinance **as a result** of the recent litigation we had in Federal Court regarding an adult entertainment facility going

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[7] Video tape, City Council meeting, 9/24/94 at 1920.

[8] Exhibits A-1 and A-2 to this my Declaration.

up on 214th and 84th – . . . " [Emphasis Added][9]

29. Further proof of the impetus for the Ordinance is found in other comments of the City Attorney:

> City Attorney: " . . . this matter **originated** with recent litigation against the City of Kent regarding the location, the sites available for adult entertainment facilities." [Emphasis Added][10]

30. The impetus for the Ordinances is again emphasized by the City Attorney:

> " . . . it's one that was critical that we get on the books last month because of the potential of a facility coming into town."[11]

31. In addition to the predominant purpose of the members of City Council for the Ordinances at issue herein, as set out in ¶¶ 32 - 37, *infra*, the predominant purpose of the author of the Ordinances is also clearly established in the record:

> "You know, it's . . . like I've said in the Council meeting before, or at other meetings, that you know, that's we can't keep these facilities from

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[9] Audio tape, City Council Operations Committee meeting, 2/25/95 at 7.

[10] Video tape, City Council meeting, 3/7/95 at 1840.

[11] Audio tape, City Council Operations Committee meeting, 4/12/95 at 296.

> coming into Kent, I mean, you know, I've talked about that many times, but this is one thing you can do . . . "[12]

> " . . . You know, we'd all like to ban them including myself, it's, you know, trying to appeal that to the Supreme Court is like jumping off a building without a parachute and – and expecting to come down to a safe landing. It just isn't going to work."[13]

32. The predominant purpose of the Ordinances is further clearly established in the following exchange between a member of the Planning Commission appearing as a citizen at the City Council Public Hearing on 3/21/95, and the Mayor:

> Ms. Nuss: "It is my sincere hope that the stiff regulations that City Council has accepted regarding adult entertainment will cause this businessman to lose interest in developing here."

> The Mayor: "Thank you Ms. Nuss, I think you have articulated the City's position very well. Thank you very much."

Followed by applause from the two City Council members on either side of the Mayor.[14]

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[12] Audio Tape 1, City Council Operations Committee meeting, 2/25/95 at 162.

[13] *Ibid.* at 165.

[14] Video Tape, City Council meeting, 3/21/95 at 503 - 515.

33. Further evidence of the City's official attitude towards Plaintiffs is found in the comments of an unidentified member of the City Council's Planning Committee who stated:

> " . . . We've got one in the neighborhood, whether we like it or not. Hopefully he won't pick up his permit though."[15]

34. The effect of the Ordinances was noted by a member of the Planning Committee: (Janet ?)

> "Thank heavens for the City Council putting the regulations in. I think that's what's stalling him.[16]

35. Later in the same meeting, after one Committee member accuses the City of inviting exotic dance studios into the City, another member responds:

> "I don't believe that we're inviting them in at all. As a matter of fact, by tightening down the regulations [inaudible] I think that our citizens are in great danger here, and I' [sic] sorry that I have never once [inaudible]. I think that by the stiff regulations that the City is proposing that that's going to – to – not – it's going to prove to be just the opposite of an invitation."[17]

36. In the whole legislative history of the Ordinances, there is no clearer indication of their predominant

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[15] Audio tape, City Council Planning Committee meeting, 4/10/95 at 7.

[16] *Ibid*, 4/10/95 at 77.

[17] *Ibid*. at 112.

purpose than the following quotations, first by an unidentified male member of the City Council's Planning Committee:

> "Another point I want to bring up. Everybody's talking about this – this business regulation license practice Ordinance that Roger's written. And it is a beaut. And if it holds up, nobody's going to want to come to this City. And everybody's saying that – they're saying: 'they're not going to want to come here anyway'. So, if they're not going to want to come here anyway, why are we concerned that somebody's going to come here and have our Zoning Code thrown out. They're not even going to try if this is such a great Ordinance."[18]

and the following comments by the Chairman of the Committee:

> " . . . with all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come in and try to open something up. Because we've made it a little bit difficult for them to make money in the traditional way they make money. So we may be in pretty good shape then, but I don't want to take any chances."[19]

37. Finally, during the discussion of the final adoption of the new Adult Use Zoning Regulations, Assistant County Attorney Laurie Evezich stated:

> " . . . in anticipation of the expiration of both the moratorium and the implementation of the Zoning Regulations, the City Attorney's office has

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[18] *Ibid* at 207.

[19] *Ibid.* at 431.

artfully [20] engaged in some licensing regulations and enacted some licensing regulations which we feel protect the citizens of Kent and would reduce any of the negative secondary effects from an adult use businesses . . . "[21].

V. OTHER INDICATORS OF THE PREDOMINANT PURPOSE OF THE ORDINANCES

V. A. HISTORIC PATTERN

38. There is an historic pattern of the City adopting Ordinances as exotic dance studio uses either became problematic, or were proposed in the City, which chronology clearly demonstrates the City's attitude to this land use.

39. In 1981, after the *Roadside Inn Tavern* became problematic, the City, after declaring the business to be a nuisance, and ordering it to be shut, passed Ordinance 2312, prohibiting topless dancing in establishments selling alcoholic beverages.

40. On May 3, 1988, the City Council became aware that an exotic dance studio named *Babes* was proposed for the City. Although the business had "a long row to hoe"[22] before it obtained the necessary permits to open, two weeks later, on May 17, 1988, the City adopted Ordinance 2778, a Licensing and Regulatory Ordinance for

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[20] "Artful" is defined as "crafty, cunning, deceitful, tricky," *Webster's Encyclopedic Unabridged Dictionary of the English Language*, Gramercy Books, New York, NY, 1989, p. 84.

[21] Video tape, City Council meeting, 1/2/96, at 2489.

[22] Verbatim excerpt, City Council meeting, 5/3/88 at 7.

exotic dance studios. A month later, the City also amended its Adult Use Zoning Regulations to include exotic dance studios.

41. As set out in ¶¶ 28 - 30, *supra*, the Ordinances at issue herein were clearly adopted as a result of the Court order permitting Plaintiffs to open their exotic dance studio in the City.

V. B. *POST HOC* JUSTIFICATION

42. Not only does the City show a pattern of adopting more restrictive Ordinances after exotic dance studios are proposed for the City, but the Ordinances at issue herein were clearly adopted with only a *post hoc* factual justification.

43. For example, in the meeting of the City Council's Operations Committee of 2/25/95, the City Attorney, discussing the need for a Public Hearing on Ordinance 3214 stated:

> "This is a protected activity – I – I just want a little bit more, I want an opportunity I would think – I'm recommending an opportunity for -for people to testify on the Ordinance – I think establishing a basis and that our findings coincide with those – with that testimony. I think it would be in our benefit to have a – have an opportunity for testimony even though [inaudible] not want it. I think it would be appropriate to have an actual hearing on it."[23]

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[23] Audio Tape, City Council Operations Committee, 2/25/95 at 50.

44. The *post hoc* nature of the "findings" or justification was echoed by another male speaker at the same meeting, who said:

> "What the hearing will do is allow us – there's a number of findings of fact here – that will give you the opportunity to make those findings."[24]

45. In the course of this same meeting, the City Attorney made further comments, which show the *pro forma* nature of the stated justification for the Ordinances:

> " . . . I'd like to pass this thing quickly, but I think we need to have a hearing and I need to have Mr. Levy have an opportunity to have this document [inaudible] – good faith on this thing and so I want to make sure that he does have a copy of this. . . . I would suggest that we have a hearing at the next meeting, and then if you want to adopt at that point, if you feel comfortable with it.[25]

46. Further, based on my analysis of the relevant documents, it is abundantly clear that the factual and evidentiary material of the "legislative history" is inadequate to show more than mere speculation and conjecture that there are the alleged adverse effects of exotic dance studios, or to show that any of the various Ordinances which the City has adopted will alleviate the perceived harms to a material degree.

47. It should also be noted that each time an Ordinance was considered (and where a work sheet was provided,) the work sheet indicated no unbudgeted impact

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[24] *Ibid* at 151.

[25] *Ibid*, at 136.

and no expenditure was forecast. These findings lead to several possible conclusions:

a) that the City knew that the various Ordinances would fulfill their predominant purpose and keep exotic dance studios from opening in the City, thereby eliminating any potential fiscal impacts and expenditures related to the administration and enforcement of the Ordinances;

b) any exotic dance studio which did open in the City would totally comply with the law, eliminating any need for enforcement expenditures;

c) new Adult Uses in commercial areas would not increase police workloads; *etc.*

48. Based on the foregoing reviews, considerations, requirements and methods, it is abundantly clear that any "evidence" or assertions that the Ordinances might advance a legitimate governmental interest were just "window dressing," and the City of Kent had no real evidence before it of either adverse primary or secondary effects associated with exotic dance studios, thereby clearly indicating that the predominant purpose of the Ordinances was other than to preclude these effects.

V. C. "MOST RESTRICTIVE REGULATIONS"

49. The City of Kent has a long and clear history of attempting to impose the **most restrictive** regulations possible.

50. For example, in the context of the former Adult Use Zoning Regulations, the City has admitted that its

requirement for the segregation of Adult Uses from non-conforming residential uses in commercial areas is unique and the most restrictive of all:

> "The reason for that is that in a review of the legislative history of – which enacted the City of Kent original Adult Use Ordinance and Zoning Ordinances, there was no indication of support for negative secondary effects of Adult Use businesses on these types of uses. And – moreover, the City of Kent is the only jurisdiction that is currently establishing 1,000 foot setbacks from legal non-conforming residential uses or multi-family uses. So, our Ordinance is the most restrictive of all."[26]

51. Further, with respect to the prior Adult Use Zoning Regulations, the Assistant City Attorney stated:

> it was a little bit hard to make the argument [that the Ordinance provided adequate sites with a straight face."[27]

52. A similar pattern is found with respect to the Ordinances at issue herein. There are numerous references in the record to the Ordinances being the "tightest", "most strict", and "most restrictive":

a) The comments of the City Attorney, Roger Lubovich, echoed by the Mayor, that the City wishes to regulate the business as tightly as possible;[28]

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[26] Audio Tape, City Council Planning Committee meeting, 11/21/95, at 176, Assistant City Attorney Laurie Evezich.

[27] Audio tape, City Council Planning Committee meeting, 4/10/95, at 143. ±, Assistant City Attorney Laurie Evezich.

[28] Video tape, the City Council meeting, 9/20/94, at 1554.

b) The comments of Council Member Johnson about the Zoning Regulations, made at the City Council meeting of 1/2/96;[29]

c) The comments of someone named Jim, at the meeting of the City Council Operations Committee, 4/12/95, and the response: " . . . [this is] As tight as we can get it.";[30]

d) The comments made at the Planning Committee workshop, and reported in ¶¶ 33 - 36, *supra;*

e) The comments of the Mayor, set forth in ¶ 26, *supra;*

f) The comments of the Police Chief at the City Council meeting where Ordinance 3214 was adopted;[31]

g) The comments of the City Attorney at the City Council meeting of 4/18/95, describing Kent's 10 foot rule as "a little bit stricter" than Bellevue's four foot rule;[32]

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[29] Video tape, City Council meeting, 1/2/96, at 2560 - 2566.

[30] Audio tape, City Council Operations Committee, 4/12/95, at Side 1, 547.

[31] Video tape, City Council meeting, 3/7/95, at tape 1 at 2245.

[32] Video tape, City Council meeting, 4/18/95, at 1430. In fact, the City of Kent's regulation is 2.5 times more onerous than that of Bellevue with respect to segregating dancers and patrons, and prohibits table dancing which is permitted under the Bellevue Ordinance.

h) The comments of the City Attorney that all dancing occur on stage is a lot stricter than Bellevue's requirement;[33] and

i) the comparison of the Bellevue, Kitsap and earlier Kent Ordinances found in the legislative history.

53. In particular, it is clear that, prior to the adoption of the Ordinances at issue herein, the City of Kent obtained sample Ordinances from a number of jurisdictions, including the City of Bellevue and Kitsap County, and then selected the most restrictive provisions on each topic, as found in the various Ordinances.

54. Based on the foregoing reviews, considerations, requirements and methods, it is abundantly clear that the City of Kent has repeatedly endeavored to make their Adult Use Zoning and Licensing Ordinances as restrictive as possible, thereby clearly indicating that the predominant purpose of the Ordinances was other than to preclude the alleged adverse primary or secondary effects of exotic dance studios.

V. D. THE REACTIONARY NATURE OF THE ORDINANCES AND THE ADEQUACY OF PREEXISTING REMEDIES

55. As set out in ¶¶ 28 - 30, *supra*, it is clear that the Ordinances at issue herein were only adopted after Plaintiffs won a Court order with respect to the zoning for their proposed exotic dance studio.

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[33] Audio Tape, City Council Operations Committee, 4/12/95, Side 1 at 517.

56. Further evidence of the reactive nature of the Ordinances is found in the Chronology in Section III, *supra*.

57. As established by the record provided, and as noted in the *Kent Adult Use Zoning Study*,[34] the City was able to close the *Roadside Inn Tavern*, (for the same alleged problems, as allegedly cause the concerns with Plaintiffs' proposed use,) based on City Ordinances and state law, as they existed in 1981, prior even to the 1988 Ordinance passed in response to the proposed opening of the *Babe's* exotic dance studio in the City.

58. Thus, to the extent that the City was genuinely concerned with preventing the alleged adverse primary (controlled substances, and illicit sexual contacts,) and secondary (increased demand for police services, relative decreases in property values, and urban blight,) effects, as early as 1981, the City had an adequate remedy in its then existing Ordinances and state law.

59. Based on the foregoing determinations, that the Ordinances were adopted in reaction to the Order of this Court, notwithstanding the adequacy of the preexisting remedies, it is abundantly clear that the City of Kent had an adequate preexisting remedy for its alleged concerns with Plaintiffs' proposed business, thereby clearly indicating that the predominant purpose of the Ordinances was other than to preclude the alleged adverse primary and secondary effects of exotic dance studios.

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[34] City of Kent Planning Department, *op.cit.*, at 10.

VI. CONCLUSION

60. For the reasons set out in the preceding subsections of this my Declaration, and in Section III of this my Declaration, it is abundantly clear that the predominant purpose of the City of Kent in enacting the Ordinances at issue herein, was to stop Plaintiffs business opening in the City.

61. Further particular proof of this predominant purpose is found in the comments of Council member Orr, quoted in ¶ 36, *supra*, and

a) in the *pro forma* attempt to provide Plaintiffs' counsel with an opportunity to appear at a Public Hearing, when the substance of the Ordinance was already completely decided;[35]

b) in the fact that the "findings" of the Ordinance were made prior to the hearing at which the City expected to receive testimony to substantiate those findings;[36]

c) in the knowledge of the City Attorney that the Ordinances would have an economic impact on Plaintiffs' proposed business;[37]

d) in the knowledge of the City Attorney that the entertainers are independent contractors who make their money selling table dances;[38] and especially

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[35] Audio tape, City Council Operations Committee, meeting 2/25/95 at 136.

[36] *Ibid.* at 151.

[37] Lubovich deposition at 17-18,

[38] *Ibid.*, p. 19.

e) in the comments by a member of the City Council's Operations Committee (Janet?): "Thank heavens for the City Council putting the regulations in. I think that's what's stalling him."[39]

f) in the colloquy between Ms. Nuss and the Mayor, set forth in ¶ 32, *supra;* and

g) in the exchange of correspondence between Ms. Hackett and the Mayor, ¶ 27, *supra* and Exhibit A.

62. Further still, at the time the City Council adopted the first Moratorium Ordinance, the Mayor stated:

> "Being asked to pass Ordinance declaring moratorium – asked legal department, Mr. Lubovich to look at other ways Adult Uses may be regulated – certainly not opening arms to welcome this type of business into community. We don't want it, we feel like we're being forced to take it."[40]

63. Based on the foregoing items, numerous other statements, inferences clearly drawn from the record, and the totality of the factual record in this matter, it is abundantly clear that the City of Kent's predominant purpose in the adoption of the Ordinances, was other than a legitimate purpose.

/s/ _____
R. Bruce McLaughlin

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[39] Audio Tape, City Council Planning Committee, meeting 4/10/95 at 77.

[40] Video tape, City Council meeting, 9/20/94 at 1554.

EXHIBIT A-1

RECEIVED
AUG 19 1994
OFFICE OF THE MAYOR

Molly Durfee Hackett
22211 124th Avenue SE
Kent, Washington 98031

August 16, 1994

Dear Mayor

I am writing to let you know that I don't want nude dancing in Kent. If the zoning is modified to allow it, I would wish that it be done very carefully and thoughtfully.

The family-friendly aspects are one of the best aspects of Kent and something we can all take pride in.

I am not a nimby or a prude – just a concerned parent and citizen. Regards – Molly Hackett

P.S. Please let me know if I can be of further help.

EXHIBIT A-2

CITY OF KENT

(LOGO)

Jim White, Mayor

September 21, 1994

Molly Durfee Hackett
22211-124th Avenue S.E.
Kent, WA 98031

Dear Ms. Hackett,

Thank you for your recent letter in which you shared your concern about the City of Kent allowing clubs that feature nude dancing. Members of the City Council and I agree with you wholeheartedly. While we want to be in compliance with the law, we also want to protect the rights of our citizens and we are making every effort to see that Kent remains a good place to live.

As a matter of fact, at our Council meeting last night, the Council voted to adopt a six-month emergency moratorium on new applications for adult entertainment establishments. While the moratorium will not apply to the already proposed club, it will, in effect, insure that no business licenses will be granted to that type of business for six months which will give us some time to explore other options. I am including an article from today's Valley Daily News which gives more details about the situation.

I am sending copies of your letter to members of the Kent City Council and to Roger Lubovich, Kent City Attorney, so that they will be aware of your concerns.

Again, I appreciate your taking the time to write.

Sincerely,

/s/ Jim White
Jim White
Mayor

JW:jb

APPENDIX F

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON dba DDF&S INVESTMENT COMPANY Plaintiffs, vs. THE CITY OF KENT, Defendant.	)	No. C95-1176Z **DECLARATION OF JUDITH LYNNE HANNA**

JUDITH LYNNE HANNA, under penalty of perjury under the laws of the State of Washington, declares as follows:

1. I am a cultural anthropologist, Senior Research Scholar at the University of Maryland, educator and writer.

2. I earned a bachelors degree in political science from the University of California at Los Angeles in 1958, a masters degree in political science from Michigan State University in 1962, a masters degree in anthropology from Columbia University in 1975 and a doctoral decree [sic] from Columbia University in 1976. My doctoral dissertation was on dance as nonverbal communication.

3. I have training in dance and have been a dancer since 1946. In addition, I taught dance and about dance at Michigan State University in 1965, the University of Texas, at Dallas in 1976, and Fordham University during 1970-1973. I have been a consultant in dance education for New York University; African-American Institute; Peace Corps; New York City Board of Education; School District of Philadelphia; Black Studies Department, City College, City University of New York; Gill/St. Bernard's High School, Bernardsville, New Jersey; West Dallas Community Center; Disney World; National Geographic Society; and Montgomery Public Schools. Recognition for my research on dance includes National Endowment for the Humanities, National Institutes of Health, and the Uniformed Services University of Health Sciences funded public lectures; American Council for Learned Societies, Wenner-Gren, National Science Foundation, American Sociological Association, American Psychological Association, International Research and Exchanges Board research grants; invited keynote addresses; and the W.G. Anderson award for significant publications. I have been an invited speaker on dance at the annual meetings and special symposia of various academic disciplines in the United States, Canada, Europe, and the Caribbean.

4. Anthropology comprises four (4) separate disciplines: physical anthropology, cultural anthropology, linguistic anthropology, and archeology [sic]. Anthropologists most often specialize in one area but have training in all four. I have specialized in cultural anthropology focusing on the arts and developing expertise in the study of dance and nonverbal communication.

5. I have conducted field work in the United States and Africa studying and performing arts and society, communication in education, and urban politics. Field research has taken me to Ubakala Igbo villages in Nigeria, fields, streets, and theaters in Uganda, Kenya and the United States, a desegregated magnet elementary school – and most recently to adult entertainment cabarets. In my field work, I examined how dance movement, in the context of time, space, and effort, like language (which it is), is able to convey messages. I have also studied what messages performers were trying to send, how they did it and what the audience perceived in that communication. In one study, I asked performers what feelings, emotions and ideas they were trying to convey and how they thought these were communicated. I also surveyed the audience to determine what they saw and what the significant cues were to receiving the messages. The coincidence of performers' communication intentions and audience member perceptions was a measure of successful communication.

6. Over the years, my writings have been frequently published. I have written four substantial books on dance and about eighty (80) articles on dance in peer-reviewed scholarly journals. My books include: *To Dance Is Human: A Theory of Nonverbal Communication*, University of Chicago Press; *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire*, University of Chicago Press; *Dance and Stress: Resistance, Reduction and Euphoria*, AMS Press; and *The Performer-Audience Connection: Emotion To Metaphor in Dance and Society*, University of Texas Press. I have two additional books on dance under contract for publication.

7. On two occasions I have been permitted to testify as an expert in court on issues relating to topless dancing, i.e., King County, Washington, and Las Vegas, Nevada.

8. Prior to and subsequent to my testimony I conducted field work in cabarets involved in challenges to new legislation. I have continued this work in order to gain an understanding of the industry and the related community conflicts about them. My research has taken me thus far to 15 adult cabarets: six (Club Extasy, Deja Vu Airport, Deja Vu-Lake City, Sugars, Papagayos, and Babes) in the greater Seattle metropolitan area; Filmore and For Your Eyes Only in Toronto; Good Guys, 1720, and Camelot in Washington, D.C.; Admiral in Chicago; Club Paradise and Little Darlings in Las Vegas; and Platinum in New York where I interviewed dancers, customers, owners, managers and staff. By telephone I have interviewed these types of informants in other states and in Canada.

In addition, I read master's and doctoral theses, books, and articles on striptease dancing in Atlanta, Boston, Eugene, Las Vegas, London, Montreal, New Orleans, New York, Providence, rural New England and the South, Quebec (Ontario), San Diego, Toronto, and Walnut Creek (California). These works were written by scholars, journalists, photographers, and former strippers. The latter works are confessionals, catharsis, confrontations with society's perception of exotic dancing as deviant, and social hypocrisy. I also have been reading publications by WHISPER (Women Hurt in Systems of Prostitution Engaged in Revolt); *AVN* (Adult Video News), *Stripper Magazine*, *Showgirls*, and EDA (Exotic Dancers Alliance).

9. I worked with Edward I. Donnerstein, Ph.D., Professor of Communication and Psychology at the University of California, Santa Barbara, and Chairperson of the Department of Communication, on a two-pronged study of erotic dance. Dr. Donnerstein is a specialist concerning the study of sexual and/or erotic expression and the effects of such on human behavior; he has served as a member of the United States Surgeon General's Workshop on Pornography, chaired by Surgeon General C. Everett Koop, and he was the lead social science witness to the United States Attorney General's Commission on Pornography chaired by Attorney General Edwin Meese. The study asked what difference it made if the dancer were closer or further from a customer, and clothed or nude, in sending and receiving messages. My role was to provide background material on dance as communication and to help develop the interview schedules for the customers. The aim was to determine if a nudity component of erotic dance and a proximity component of erotic dance were each part of the message content being communicated through such dance, as opposed to being merely the manner in which the dance was displayed. That is, what impact, if any, would there be by precluding nudity in such dance performances, and what impact, if any, would there be by precluding the customary industry-wide 1-6 inches distance between performers and customers.

The study, partially submitted to the United States District Court for the Middle District of Tennessee, Nashville, Division, 1995, in the State of Tennessee Public

Indecency Statute Litigation, found that nudity and proximity were each, indeed, expressive components of the dance.

10. Attached hereto as exhibit "A" is a copy of my curriculum vitae.

11. I was hired by Gilbert H. Levy to provide certain opinions relating to the impact of Pierce County Ordinance 94-5 on the attempted message and speech of erotic dancers in Pierce County, Washington, and also to provide an opinion on whether or not table dances, as opposed to stage dances, as they are commonly performed in the State of Washington and in other areas of the United States and Canada are a unique form of dance expression, which are adversely impacted by the Pierce County Ordinance. It is my understanding that the Pierce County Ordinance requires that all erotic dancing take place on a stage ten feet from the nearest patron.

12. Like verbal speech, dance has communicative components. Verbal speech uses the mouth, vocal cords, and body language to communicate. Dance uses the body language of movement through time, space and effort as the raw material for the performance of kinetic messages; music, costume and verbal speech may enhance the messages. Dance requires the same underlying faculty in the brain for conceptualization, creativity and memory as does verbal language in speaking and writing. Both forms have vocabulary (steps and gestures in dance), syntax or grammar (rules for putting the vocabulary together) and semantics (meaning). Dance, however, assembles these elements in a manner that more often resembles poetry,

with its multiple, symbolic and elusive meanings. Pragmatics (the social, economic, cultural and historical context in which a communication takes place) applies to verbal and nonverbal forms. As with much linguistic behavior in which an individual creates sentences and responds to them without being conscious of how it is done, dance processes sometimes operate without the dancer's or spectator's awareness of the vocabulary, grammar and semantics of a dance idiom. Dancers and spectators construe meaning from their personal and cultural experiences. Consequently, they have different expectations for different forms of dance. Different forms of dance have different aesthetics, or notions of appropriateness and competency. Dancers and spectators often engage in nonverbal "communication" as the spectator responds to the dance communication.

13. Dance communicates through the senses: There is the sight of dancers moving in time and space. There are the sounds of physical movements on the floor and body as well as breathing. There is the smell of the dancer's breath, physical exertion, and perfume. There is the tactile sense of body parts touching the ground, other body parts, people or props. There is what is called the proxemic sense, that of distance between people. And there is the kinesthetic sense (feeling of bodily movement and tension, or empathy with dancers). Each of these sensory components contributes to conveying the message of the dance.

14. In erotic dancing (also called exotic or striptease dance, and including the specific forms of table, couch or lap dancing), the performer uses movement of the body, often simulating culturally-specific rhythms of sexual

activity, to suggest, e.g., sexual flirting, foreplay, and consummation. A female performer attempts to entice the audience member(s) through the display of feminine sensuality – and to stimulate an economic transaction with an audience member in exchange. Male performers similarly attempt to entice patrons. The performer-audience connection depends on the dancer receiving feedback to validate the desirability, passion and adoration she or he must project.

15. In the United States and Canada, table dances are a distinct form of erotic dance performed by performers in variable states of clothing (and sometimes complete nudity) in front of an individual audience member at his or her table at a distance ranging from 1 to 6 inches. Similar to table dances are stage dances where the dancer performs within 6 feet to 1 inch from the patron. The patron of dancing may become part of the performance for other audience members who can identify with the patron. Unpredictable spontaneous exchanges between the performer and the patron create entertainment value for everyone.

16. The table dancer focuses on an individual audience member and the particular customer's responses in order to send *a personal message not manifestly intended for the audience as a whole.* The message of "I am for you and you alone," "you're special," and "you're important" permits the individual customer "rapture," as one dancer explained, a fantasy of assignation, possession, foreplay, and consummated relationship. The message of the dance is personal interest in and understanding of the customer, eroticism, desire, allure, promise of ecstasy, and the beauty of the body. The entertainer creates an illusion of

concern and availability for the customer, and seeks to effect a transformation in the patron's feelings. Some customers get the personal attention of an attractive female who would not otherwise relate to them or "give them the time of day"; some customers are reminded of what it is to be desired.

Nobel Laureate Octavio Paz explains that eroticism as a "representation" diverts or denies sex in action. Eroticism is "sexuality transfigured, a metaphor. The agent that provokes both the erotic act and the poetic act is imagination . . . eroticism is a metaphor . . . Like all metaphors, it points to something that is beyond the reality that gave rise to it, something new and different from the terms that it comprises." Paz says, "Eroticism is, above all else, exclusively human: it is sexuality socialized and transfigured by the imagination and the will of human beings."

17. An essential element of dance that allows a table dancer to send a personal message of intimacy and spontaneity not found in a stage dance is *the use of space – proximity.* The kind and meaning of distance between people in sending and receiving messages has been studied by Edward Hall. He told us as early as 1966 in his book, *The Hidden Dimension,* that groups differ in the amount of spatial distance between communicants. For example, among the Arabs, olfaction occupies a prominent place. "Arabs consistently breathe on people when they talk . . . To smell one's friend is not only nice but desirable, for to deny him your breathe is to act ashamed" (p. 159-160). Norine Dresser's 1996 book, Multicultural Manners: New Rules of Etiquette for a Changing Society, notes that when a Filipino mother is going

out she leaves on a child's pillow or in the baby's crib a piece of clothing that she had just removed so that her scent remains with the child, offering reassurance she is still with her offspring. A grandmother will sniff a child, because odors, inter alia, disclose information about health and hygiene. In addition to cultural diversity, audience members vary in their physical ability to see, hear, and smell. In the aesthetic of table dance, audience members receive erotic messages through their senses, especially the visual and olfactory. They see muscle contraction and release, nipple erection, and tension and relaxation, as the body gyrates, pulsates, trembles, wiggles and writhes, and shimmies in time and space with effort. They smell the dancer's odor, especially perfume. Constance Classes in her study *World of Sense: Exploring the Senses in History and Across Cultures* explains the importance of olfaction. Scent has a long-standing association with sensuality, a spicy smell conveys the social identity or alluring femmes fatales. Anthropologist Helen Fisher, in *Anatomy of Love* says, "The human body may produce some of the most powerful olfactory aphrodisiacs of all. Both men and women have 'Apocrine' glands in their armpits, around their nipples, and in the groin that become active at puberty." Fragrance sells homes, makes people feel good, and is associated with intimacy. Even the Bible attaches value to fragrance; the Song of Songs is particularly noteworthy for its olfactory imagery that bespeaks of romance.

In American culture, Hall found that intimate distance has a close phase: 0-6 inches, such as in lovemaking, wrestling, comforting, and protecting. The far phase is 6-18 inches for less intense but still intimate

interaction. Personal distance, the usual space we maintain between ourselves and others has a close phase: 1½ to 2½ feet for people bonded in some ways, such as family members. The far phase is 2½ to 4 feet used for discussing subjects of personal interest and involvement. Social distance has a close phase of 4-7 feet used for impersonal business. The far phase of 7-12 feet is for formal business as in an office or home. Public distance has a close phase of 12-25 feet, such as in a presentation to a small audience. The far phase is 25 feet or more. We have spatial separation appropriate to certain types of interaction. A romantic/sexual relationship in American culture commonly includes a dinner or nightclub date with the pair seated proximate: 0 to 36 inches apart. Close physical distance is itself a sign of attraction and often bespeaks of eros. Little spatial distance between a dancer and customer is a metaphor of tactility, part of sexuality. Ashley Montagu in *Touching: The Human Significance of the Skin,* has pointed out that there is a massive involve of skin in sexual congress. Consequently, in the erotic dance industry, the norm for table dance is proximity (1 to 6 inches) because this permits a greater multisensory interaction between the individual audience member and the performer than occurs in a stage dance where the customer may be 6 feet or more from the dancer. Propinquity permits the collection of information that enhances communication. The dancer, an actress, and customer must be able to "read" each other: proximity permits eye contact and awareness of indicators of attraction and satisfaction such as the mouth position, eye brightness, pupil dilation and expansion, facial color, breath, perfume, and body odors.

Proximity in other kinds of dance is used to involve the audience member in the performance and to create a mood or sense of immediacy, a sense of "here and now." For example, the performance of "Astarte" by Joffrey Ballet started with a dancer actually seated in the audience, next to paying patrons. Some performances involve inviting audience members on to the stage, while others involve the performers coming off stage into the audience area. Dance audience members, myself included, often sit a foot away from the dancers at the Dance Place in Washington, D.C. Dancers dance in close proximity in flamenco in the caves of Granada, at weddings among Arabs and Jews, and in numerous African cultures. Indeed, some religious services create a sense of closeness and immediacy by taking the gospel into the pews where the congregation sits.

I base the opinion of the essential importance of close proximity in table dancing on my education, training, background, knowledge of the literature, field work in general, field work in the area of topless dance, and interviews with dancers and customers.

18. Stage dances, as the name implies, are dances performed on stage for the audience as a whole. The dances serve to showcase the performer and advertise her or him for individual table dances. If the dancer were only performing on stage with a 10 foot distance between dancer and customer, this would, by contrast with table dance, denote coldness and impersonality. On-stage the dancer is viewed on a pedestal and inaccessible. "Bugaku," an erotic ballet performed by the New York City Ballet in a 3,000 seat opera house at distances of several hundred feet provides an illustrative contrast with table

dance: "Bugaku" is an interaction about two people on stage, whereas table dance is an interaction between a dancer and a customer off stage.

19. Disappointment in the erotic dance because of its inability to convey the expected erotic message of table dance will result in a degradation of the dancer's message such that it completely eliminates the table dance, a distinct form of dance and medium of expression.

20. It is my professional opinion that restrictions on dance that prohibit proximity will have a negative impact on the arts as a whole. Different dance genres influence each other and patrons of one dance form often explore other dance forms. Response of my informants regarding notions of intimacy, privacy, and the illusion of a relationship suggest that patrons' expectations will not be satisfied and the audience will be disappointed. Disappointment in the dance because of its inability to convey the expected personal erotic message will result in fewer dances being performed.

21. It is my professional opinion that in the context of erotic dance, proximity is an expressive component of the table dance and is not merely incidental conduct associated therewith.

22. It is my professional opinion that in the context of erotic dance, proximity is, itself, an expressive component of the table dance and is not merely the manner in which such dance is performed.

23. I have been asked to render an opinion as to whether the requirement that dancers perform 10 feet

from the customer simply makes the message as expressed in the dance performance slightly less graphic, as opposed to altering the actual message and content of the expression. It is my professional opinion that requiring dancers to maintain such distance directly and unmistakably effects the content of the erotic message sought to be conveyed by the performer.

I HEREBY DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 2 day of July, 1996, at Seattle, Washington.

/s/ Judith Lynne Hanna
JUDITH LYNNE HANNA

APPENDIX G

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK COLACURCIO, JR., DAVID EBERT, and STEVE FUESTON d/b/a DDF&S INVESTMENT COMPANY, Plaintiffs, vs. THE CITY OF KENT, Defendant.	NO. C95-1176Z **DECLARATION OF EDWARD I. DONNERSTEIN**

Dr. Edward I. Donnerstein, under penalty of perjury under the laws of the State of Washington, declares as follows:

1. I am a Professor of Communication and Psychology at the University of California, Santa Barbara, and am currently Chairperson of the Department of Communication. I was Chairperson of that Department from 1986 to 1991, Vice Chairperson from 1991 until 1994, and once again returned as Chairperson this year.

2. I teach in the areas of the psychological effects of media, mass media policy, policy implications of social science research, and research design, methods and statistics. I have taught these subjects, and particularly the area

of research design, since 1972, and my teaching experience has been in Illinois, Iowa, Wisconsin, Canada, Beijing, China, and in California.

3. Although my research and teaching is devoted to a wide variety of areas, I have developed over the years the areas of specialization concerning the study of sexual and/or erotic expression, and the effects of such on human behavior, and the effects of violent forms of communication on individuals. My areas of concentration often concern the intersection between psychological theory and research, and the law.

4. My expertise in the area of sexual and/or erotic expression has resulted in me serving as a member on the United States Surgeon General's Workshop on Pornography, chaired by then Surgeon General C. Everett Koop during the Reagan administration, and as the lead social science witness to the United States Attorney General's Commission on Pornography chaired by Attorney General Edwin Meese, also during the Reagan administration, which has generally been referred to as the "Meese Commission."

5. I regularly obtain grants for the conducting of studies that I have designed, and many of these grants have been provided through various governmental agencies and organizations, including the United States Army, the National Institute of Health, the National Institute of Mental Health, and the National Science Foundation. In 1994, I, along with a number of my colleagues, was awarded a grant in excess of Three Million Dollars by the National Cable Television Association to conduct research

from 1994 until 1998 with regard to the content of depictions of violence on television; this grant being part of a governmental and industry desire to assess the levels of violence on television so as to inform legislators, parents and the industry as to solutions regarding media violence.

6. As indicated in my current Curriculum Vitae (hereinafter "C.V."), a copy of which is attached hereto and incorporated herein by reference, I have published regularly and frequently over 125 articles in my areas of specialization. In addition, I have testified frequently as an expert witness in court and before legislative bodies, both domestic and foreign, regarding human sexuality, pornography, violence, the media, and the effects of erotic expression on human perceptions and behavior. This testimony is set forth, in detail, on pages 27-28 on my C.V., and includes testimony before the Canadian Commission on Pornography and Prostitution, various committees of the Parliament of Australia, the New Zealand Indecent Publications Tribunal, the United States Senate Judiciary Committee, and the Federal Communications Commission. I have been qualified as an expert witness in the areas of erotic expression and its effect on human perceptions and behavior in numerous courts in the United States and Canada, including, but not limited to testimony in the United States District Court for the Western District of Tennessee, in the case of *United States of America v. Ellwest Stereo Theatres of Memphis, Inc., et al.*, Case Nos. 89-20254-G, 89-20255-G, and 89-20256-G, before the Honorable Julia S. Gibbons. Most recently, I testified before the United States Senate Commerce, Science and Transportation Committee on July 12, 1995 and

presented testimony on the effects of mass media violence. This testimony was offered in connection with the research grant and study we are conducting concerning television violence and development of the so-called "v-chip".

7. I regularly, and on an ongoing basis, design and conduct research studies regarding the effects of mass media, the effects of certain forms of expression upon individuals and groups of people, and matters concerning the interrelationship between the mass media and social policy.

8. In June, 1995, I was contacted by Jack R. Burns and asked to design and to conduct a study concerning the expressive message being conveyed in erotic performance dance, in order to determine what impact, if any, there was on this message by a requirement that there be a certain distance between the performer and her audience during such performances. In particular, we were asked to test the accuracy of the statement in *Kev Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986) that "[w]hile the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired.. Basically, we were asked to design and carry out a study to determine if a distance component of certain erotic performance dance was part of the content of the message being communicated by and through such dance, as opposed to being merely the manner in which such dance was displayed, and, if so, what impact, if any, on such a message there would be by increasing the required distance between performer and audience.

9. With these goals in mind, my associate, Dan Linz, and I visited an erotic dance establishment, Little Darlings, in Las Vegas, Nevada, in order to familiarize ourselves with the type of dancing involved, the manner in which it was normally performed, and to develop a conceptual format for conducting a study. Little Darlings is run by the "Deja Vu" organization, and, from what I have been told, provides the same type of performance dance entertainment as exists in other "Deja Vu" clubs around the country, including that in Pierce County, Washington. As a result of this visit, consultations with Beth LePoire, a professor in our department who specializes in non-verbal communication, and consultations with Judith Lynne Hanna, a cultural anthropologist who specializes in the communicative aspect and content of performance dance, we designed a study that objectively measures the impact of nudity or non-nudity on the ability of an erotic entertainer to effectively convey the message of her dance.

10. In designing this experiment, we actually chose to conduct two (2) separate studies. This was done for two reasons. First, one of the studies was part of a larger study involving performance dance. Second, two different types of studies were chosen so that we would have greater confidence in our results if, in fact, any differences were measured between the four (4) foot and six (6) inch conditions as a result of the responses received from the participants. The study, described in the report attached hereto was designed, with regard to the variable of distance, as a "between-subjects" design. This means that participants did not see both a performance in the nude, and a performance clothed. They simply saw the same dance performance (whether it be, randomly, nude

or non-nude) at varying distances (the nude variable being related to the other portion of this study that is not relevant here). As a consequence, the participants of this study were not afforded the opportunity to compare the same dance performance in a condition of nudity and a condition where the performer was clothed. Because of this lack of comparison, it is much more difficult to obtain results where responses are different on the basis of the variable chosen (here, distance). Thus, when differences are observed in a between-subjects study design, this indicates that the chosen variable (here, again, distance) has an extremely strong effect on the perceptions and attitudes of the participants, and that we can be extremely confident that the measured differences are, in fact, as a result of the study variable (i.e., distance).

11. Attached hereto is the Final Report of the Distance and Message Effectiveness Study that we conducted, and I incorporate by reference the text of that report herein. The final report was prepared by myself, and my associate, Dr. Daniel Linz, and the statements and findings as contained therein are true and accurate. Below is a brief description of our study design and methodology:

a. Study Subjects. We determined that it was appropriate to use regular patrons of an erotic dance facility inasmuch as our goal was to measure the consequences of various controls to dance entertainment upon the intended audience of such entertainment. With a random selection of subjects, there would undoubtedly be some who found any sort of nude or erotic dance objectionable. As a consequence, their responses would reflect their

distaste for the dance itself, rather than the discrete variables we were attempting to measure. By selecting club patrons, our study would not suffer from this problem.

b. The Dance. In viewing the establishment offered at Little Darlings, it was immediately apparent that each entertainer had her own style. In order to control for variations in style which might affect the communicative aspects of the dance, i.e., one style may be more communicative than others, it was determined that it would be necessary to choreograph a single dance so that each subject was presented with essentially the same dance, with the only variables being those that we were seeking to measure. A professional choreographer was retained to choreograph a specific dance routine and to teach it to the entertainers that we were going to use in the study. Prior to the commencement of the study, I confirmed that all of the dancers knew the choreographed dance routine and could consistently perform it. I have reviewed the dance routine that was choreographed and that was used throughout these studies, and it is entirely comprised of various dance performance components that are regularly used, seen, and displayed in the Little Darlings club.

c. The Entertainers. To the extent possible, we attempted to recruit entertainers that possessed generally the same physical characteristics. In addition, the entertainers wore identical costumes, undergarments and perfume. Out [sic] goal was to reduce "attractiveness" as a variable.

d. Study Format. With the cooperation of Little Darlings, we isolated an area of the club with curtains. This area was divided into four areas; an area for each of three

subjects, and a waiting area for the entertainers and for our observer. When seated, a subject could not view any other subject, the entertainer performing for another subject, or the entertainer waiting area.

Nine separate entertainers were used in the study. Three (3) entertainers appeared randomly for each set of subjects. Each entertainer performed the same dance, once for each of the three (3) subjects.[1] Each subject received three (3) dances; i.e., a dance at a distance of four (4) feet, a dance at approximately six (6) inches, and a dance at six (6) inches with a single brief touch on the cheek, shoulders and forearm.[2] Half of the time, the dances were performed in a nude condition. In this condition, the dance started with the entertainers clothed in a dress only. During the dance, the dress was removed so the entertainer was entirely nude. The other half of the time, the dances were performed in a non-nude condition. In this condition, the entertainers wore a bra and panties under the dress which were not removed when the dress was removed. In this study, each participant would see the three performers either all nude or all non-nude.

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[1] On occasion, only two subjects would be available. On those occasions, each subject still received three (3) dances, one from each of the three entertainers dancing in that round.

[2] As discussed above, because of the additional variable of touch, no data concerning study participants who were subjected to the "6-inch touch" performance is included in the report attached hereto, and my opinions as contained within this Affidavit are not based upon any such data.

Prior to the dances, the subjects were instructed not to talk to the entertainers. This was done in order to control for the effect of verbal communication. While the dances were being performed, we stationed an observer, Eva Blumenthal, a graduate student in our communications department, in the room where she could observe each dance. Her job was to verify that each dance was performed as choreographed and that the study rules regarding verbal communication were observed.

After the dances were completed, each subject was asked to complete a questionnaire designed to measure several attributes of the dance communication.

e. The Questions. The questions that were contained in our studies, relating to perceptions involving the dance performances, were derived from a number of different sources. First, we were provided with copies of the United States Supreme Court decision in *Barnes v. Glen Theatre. Inc.*, 501 U.S. ___, 115 L.Ed.2d 504 (1991), and the underlying Circuit Court of Appeals decision in *Miller v. Civil City of South Bend*, 904 F.2d 1061 (7th Cir. 1990). These cases discuss, and, in particular, the concurring opinions in *Miller*, the "message," ideas, and concepts that are attempted to be conveyed, and are conveyed in and by erotic performance dance. Second, as referenced above, an associate of mine, Dr. Beth Lepoire, a professor in our department who specializes in non-verbal communication drafted a number of the questions, particularly with regard to the relational communication questions, as used in the study. Third, we received the input and advice of Dr. Judith Lynne Hanna, a cultural anthropologist, who has significant professional research experience, both in dance and erotic performance dance, and who

also provided to us various written materials on these subjects. After receiving the input of these professors, and my associate, Dr. Daniel Linz, we, in consultation with one another, came to a consensus opinion as to the questions to ultimately be used in these studies. In my professional opinion, from the legal decisions that I have been provided, from the research that I have conducted, from my review of the topical literature, from my previous professional experience and training, and from the input that I have received from my colleagues, the questions as contained in the two studies, and as are reported on in the final report attached hereto, are all appropriate questions which measure the communicational aspects and attributes of erotic performance dance.

12. We began gathering data on Monday, August 21, 1995 and finished on August 24, 1995. The results of the study are contained in the Final Report of the Distance and Message Effectiveness Study attached hereto and incorporated herein by reference. The results found in the final report are statistically significant, and contain the appropriate level and degree of confidence to enable me to reach certain conclusions as a result of these studies.

13. The findings as set forth in the final report are reported in terms of probability factors (i.e., "P < .05"). This is the confidence level that we would ascribe to the reported results. Thus, if the report shows a probability factor of .05 ("P < .05"), that means that we are 95% sure that the results that have been obtained are as a direct consequence of the variable as set forth in the study (i.e., distance), as opposed to some random chance. The probability factors that we have utilized in these studies in

order to determine statistical significance are the generally accepted levels in the scientific community.

14. In analyzing the data obtained, the appropriate scientific method would be to sum the responses to the various questions as are contained within the three categories of measurement (relational communication, erotic communication, and social communication?, in order to come up with three separate composite scores. This is the appropriate scientific methodology to determine the statistical significance of the results obtained from these studies, and we have reported the data as such. We have also provided the statistically significant results obtained on separate individual questions as a result of a request of the attorneys involved in this matter.

15. The primary findings of the study are that:

a. The relational communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by separating the entertainer as little as four (4) feet from her intended audience.

b. The erotic communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by separating the entertainer as little as four (4) feet from her intended audience.

16. Based upon these findings and the results of the final report, I have reached the following conclusions which I hold in my professional opinion to a reasonable degree of scientific certainty;

a. In the context of erotic performance dance, distance is, itself, an expressive component of the dance and not merely incidental conduct associated therewith.

b. In the context of erotic performance dance, distance is, itself, an expressive component of the dance and not merely the manner in which such dance is performed.

c. The requirement that dance performers be separated from their intended audience by a minimum distance of ten (10) feet significantly and substantially deprives the dance of the relational message that is sought to be conveyed.

d. The requirement that dance performers be separated from their intended audience by a minimum distance of ten (10) feet significantly and substantially deprives the dance of the erotic message that is sought to be conveyed.

e. The requirement that dancer performers be separated from their intended audience by a minimum distance of ten (10) feet does not simply make the message as expressed in the dance performance slightly less graphic; it actually effects and significantly alters the message being conveyed.

f. In the context of erotic performance dance, distance is not simply a non-communicative element, but is, actually, an integral part of the content of the expression.

g. The requirement that dance performers be separated from their intended audience by a minimum distance of ten (10) feet is not, in the context of erotic performance dance, unrelated to the content of the expression that is sought to be communicated thereby.

h. Regulations that would require an erotic dance performer to be separated from her intended audience by a minimum distance of ten (10) feet are directed at the

content of the expression as contained in erotic performance dance,

i. In the context of erotic performance dance, distance is part and parcel of the relational and erotic communication sought to be communicated thereby, and is not the mere manner of a performance or incidental conduct thereof.

j. The relational and erotic communication sought to be communicated by erotic performance dance is significantly and substantially effected, reduced, and degraded by the requirement that performers be separated from their intended audience by a minimum distance of ten (10) feet.

DATED at Santa Barbara, California, this 8th day of July, 1996.

/s/ Edward I. Donnerstein
Edward I. Donnerstein

Final Report of the Distance and Message Effectiveness Study

Date: March 18, 1996

Prepared For: Burns & Hammerly
500-108th Ave NE
Suite 770
Bellevue, WA 98004

Prepared by: Dr. Edward Donnerstein and
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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

Distance Requirements 1

Theoretical Background 2

METHOD 3

Design 3

Materials 3

Procedure 5

RESULTS 7

Relational Communication 7

Erotic Communication 8

DISCUSSION 9

REFERENCES 11

LIST OF FIGURES..... 12

INTRODUCTION

The purpose of this study was to determine whether the erotic, relational, and social messages conveyed by erotic dancers are significantly influenced by the variable of distance. Distance in this study is defined as the amount of space between a dancer and a patron. This study was part of a larger project on erotic dance which examined both nudity and distance. In this report, however, we will only discuss the results as they related to distance and those conditions which most resemble the Pierce County ordinance. Specifically, we tested the hypotheses that: 1) dancers who are further away from a patron would communicate a significantly *less* erotic and *less* intimate relational message than dancers closer to the patron. This is in contrast to the statement in *Kev Inc. v. Kitsap County,* 793 F.2d 1053, 1061 (9th Cir. 1986) that "[w]hile the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired."

BACKGROUND

Distance Requirements

Ordinances in Washington state and elsewhere have required that all nude dancing take place at some specified distance from patrons (e.g., At least ten feet from patrons and at least two feet from floor; or 6 feet from

nearest patron, eighteen inches above floor). Also prohibited by various state ordinances is fondling and caressing of patrons and dancers by each other. These ordinances have been considered reasonable time, place manner restrictions allowable under the First Amendment (e.g., *Kev, Inc., v. Kitsap County,* 793 F.2d 1053 9th Cir. 1986; *O'Day et al., v. King County,* 109 Wn. 2d 746, 749 P.2d 142, 1988). While regulations that restrain speech on the basis of content presumptively violate the First Amendment, content neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

Theoretical Background

Social psychological and communication theory would suggest that physical distance makes a difference in our social interactions because of sensory involvement and changed expectations about behavior among the interaction participants. Social science research has demonstrated that we generally agree on four "zones" or distance categories for social interaction. Within each zone different informational cues are available and different expectations arise. These cues and expectations influence how we perceive and provide a frame of reference for interpreting the communication. Zero to 1 and 1/2 feet is considered the "intimate" zone. In this zone sensory involvement is most pronounced. One and 1/2 feet to 4 feet is considered the "personal" zone. Four feet to 10 feet constitutes the "social" zone. At the social level sensory involvement is significantly reduced compared to previous two levels. A distance of 10 to 25 feet is considered the "public" zone. Sensory involvement is greatly

reduced at this level and other objects and people compete with the communicator for attention.

Theoretically speaking, and based upon past empirical research, it may be assumed that relational and erotic messages significantly change as the distance between a dancer and patron increase. In this study we tested the following specific hypothesis: Holding nudity constant, dancers that are 4 feet from a patron will communicate a message which is significantly different than dancers 6 inches from the patron.

The question asked of participants in this study were drafted so as to be both scientifically sound and consistent with applicable law in this case. Questions were drawn from judicial opinions in *Barnes v. Glenn Theatre Inc.* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) and in *Miller v. Civil City of South Bend,* 904 F2d 1081, 1089 (7th Cir. 1990), as well as psychological and communication theory. For example, using *Miller* we selected the question asking if the dancer's dance was "alluring with a message of temptation" (*Miller v. Civil City of South Bend,* 904 F2d 1081, 1089 (7th Cir. 1990). Experts in dance (Professor Judith Hanna) and relational communication (Dr. Beth LePoire) were consulted for advice on other questions.

METHOD

Subjects

Sixty nine participants in the Little Darlings dance club of Las Vegas were recruited for participation in a

larger study involving the distance and nudity aspects of performance dance.

Design

A 2 X 3 mixed, within-subjects and between-subjects factorial design was employed. The within subjects variable was distance from participant (4 feet, 6 inches, or 6 inches with touch). The two between-subjects variables were nudity (dancer nude or non-nude). For purposes of this report, only the data of those subjects who viewed a nude dancer at a distance of 4 feet or 6 inches were analyzed. These conditions (nudity and no touch) reflect the situation most relevant to the present case.

Materials

Consent form. Participants were asked to read and sign a consent form which read as follows:

> This is to acknowledge that I have been informed that I will be asked to view three adult entertainment dances. Each dance will last approximately 3 minutes. I understand that these dances may involve nudity. I also understand that during the three dances I am not to talk to the dancers and while performing the dancers will not talk to me except to introduce themselves. I also understand that I am not allowed to touch any of the dancers. I further understand that I will be asked to complete a short questionnaire before I see the dances and one or more short questionnaires after I have seen the dances. Your Participation in this study and any answers which you give will be completely *confidential.* I understand that If I have any problems during the study I am to contact any one of the staff personnel who will answer

> any questions or address any concerns I may have. I understand that for my participation, which will last approximately 20 minutes, I will be provided a Deja Vu VIP Card which can be used at Deja Vu clubs nationwide. My signature below indicates that I have freely volunteered for this dance evaluation and understand what I will be asked to do during this evaluation.

Pre-dance questionnaire. Before viewing the erotic dance, participants completed a questionnaire which asked them to report: 1) Business or a personal relationship with anyone that worked in this Little Darling's establishment, Deja Vu dance clubs across the country, or with anyone in the exotic dance industry; 2) If they had heard anything about this study or the specific questions asked; 3) Whether that [sic] had previously visited this Little Darlings club or any club where nude or exotic dancing is offered; and 4) Employment in any capacity in law enforcement. If the participants answered YES to questions 1, 2 or 4, they were to be deleted from the study. No participants answered YES. In addition, demographic information including, age, race, religiosity, marital status, income, political orientation (Conservative-Liberal), and level of education was requested of the participant.

Post-dance questionnaire. After viewing the dances, the participants completed a questionnaire which contained the following items relevant to this study measuring relational, and erotic communication.

1. *Relational communication.* "Did you feel that the dancer was expressing to you through her dance the fantasy that: (a) She wanted to make you feel like you

were a special person? (b) She liked you? (c) She was personally interested in you? (d) She desired you? (e) There was intimacy between the two of you? (f) She wanted to be romantically involved with you?"

2. *Erotic Communication.* "The Dancer's dance was: (a) Passionate. (b) Artistic. (c) Sexy. (d) Erotic. (e) Alluring with a message of temptation. (f) Seductive. (g) Stimulating. (h) Personal."

Each question subcomponent was followed by a "Definitely Yes" to "Definitely No" response scale anchored by the numbers 1 and 8. They were also asked if they had ever had a private one on one dance with this entertainer? If any participant answered YES to this question they were to be eliminated from the analysis, however, none did.

Procedure

The study was conducted at the Little Darlings dance club, Las Vegas, Nevada. Participants visiting the club between 12:00pm and 9:00pm during the week of August 19-23, 1995, were randomly recruited to watch three dances. The recruitment was done by Dr. Dale Kunkel and/or Mr. Tim Gray of the University of California-Santa Barbara. The solicitation of participants used the following outline:

> Hello. My name is _____. I work for a research company that has been hired by the club to study how people react to several different types of dances that they might want to use in the club. We are recruiting participants for the study right now. We need people who are willing to watch three dances we are evaluating.

> Each dance will be done privately for you by a different woman. After you have seen each dancer, you will then be asked to fill out a questionnaire that tells us what you think about each of the dances. If you are willing to participate, I can offer you a VIP card which allows free admission to any Deja Vu club. It will only take about 15-20 minutes to complete the study. Would you like to do this?

After being recruited, three participants at a time were taken to a closed off room in the back of the main club area where they read and signed the Consent form. They were then provided the following instructions about the completion of the Pre-dance questionnaire:

> Before we have you view the dances, we need you to answer a few questions about yourself. All of the information you provide is confidential and fully anonymous. It will never be examined individually. We are interested only in the overall reactions of large groups of people. Please complete this questionnaire and return it to me when you've finished. Let me know if you have any questions. Once you're finished, it will just be a short wait before we begin the dances.

After completing the form, the three participants were taken to an adjoining room where they were to watch the dances. The participants were separated from each other by a partition. Once seated, they were given the following instructions:

> We are going to show you three dances. Each one will be presented by a different performer. It is important that you *do not talk to or touch* any of the dancers. There will be a brief pause between each dance. Please stay seated until the

last dance has been completed. Do not offer the dancers any tips or money. Afterwards, I will give you a questionnaire that asks you how you felt about each of the dances. Remember that we are interested in getting your reaction to each dance that you see. We are not trying to evaluate the women who are dancing. Nothing that you tell us will be used to affect a dancer in any way. Once you have completed the questionnaire, I will give you the special VIP card for future admission to any Deja Vu dance club as our thanks for your help.

Participants then viewed the three dances, one at a time, in random order. Eight dancers were employed and randomly assigned three at a time to distance conditions. The dance routine and the music accompanying the dance were held constant except for variations in distance. The dancers were trained by a professional choreographer to perform exactly the same routine at each distance, save a brief touch to the shoulders and arms under the 6 inch touch distance (this condition is not part of the present report). During any one sequence of three dances, all the dancers performed either Nude or Non-nude. The Nudity condition was reversed for the next sequence. Each dance was 3 minutes in length. All aspects of the dance were identical (e.g., same shoes, costumes, perfume, distance, lighting, music, etc.) except for the distance from the participant and the variable of nudity. All dancers began their routine with a black dress which was removed within seconds of the dance commencing. Dancers in the non-nude condition were clothed in a bra and panty, while those in nude condition did not wear these items of clothing. In the present report only the participants in the nude condition are included.

In order to assure that the dancers were performing the correct routine, Ms. Eva Blumenthal of the University of California-Santa Barbara coordinated the schedules of the dancers and observed all performances.

After viewing the dances, the participants were taken back to the adjoining room where they had completed the earlier consent form. They were given the Post-dance questionnaire by Dr. Kunkel and Mr. Tim Gray, which contained a picture of each of the dancers they had seen. They were also asked if they had ever had a private one on one dance with this entertainer. If they answered YES they were to be eliminated from the analysis. Dr. Kunkel and Mr. Gray explained how to complete the questionnaire and answered any questions the participant had. Subjects were separated in distance in order that they could not view each others responses. Upon completion of the questionnaire, the participant was thanked for their participation and presented the VIP card.

RESULTS

Relational Communication. There were six items which comprised the *Relational Communication* questions. The question and items were as follows:

Did you feel that the dancer was expressing to you through her dance the fantasy that:

1. She wanted to make you feel like you were a special person?

2. She liked you?

3. She was personally interested in you?

4. She desired you?

5. There was intimacy between the two of you?

6. She wanted to be romantically involved with you?

These six items were summed to form a composite measure for *Relational Communication*. A statistical test (Student's t-test) designed to differentiate significant differences between groups from chance differences at the .05 level was employed. We compared participants in the 4 feet distance group versus those who viewed the dancer from 6 inches on the *Relational Communication* measure. This comparison revealed a significant effect for Distance ($p<.05$), with dancers at 6 inches being rated as more expressive overall than their 4 foot counterparts. These results are displayed in **Figure 1**.

Individual analysis on each of the six items showed significant effects on the following questions:

a. She wanted to make you feel like you were a special person ($p<.05$)

b. She liked you ($p<.05$)

c. She was personally interested in you ($p<.05$)

d. There was intimacy between the two of you ($p<.05$)

e. She wanted to be romantically involved with you ($p<.05$)

These results are displayed in **Figure 2**. In all cases, dancers at 6 inches were rated more expressive on each of these items than dancers at 4 feet. The remaining item, while not statistically significant, showed the same pattern of results; and had more participants been used in

this study, the results would have been statistically significant.

Erotic Communication. There were eight items which comprised the *Erotic Communication* questions. The question and items were as follows:

The dancer's dance was:

1. Passionate
2. Artistic
3. Sexy
4. Erotic
5. Alluring with a message of temptation
6. Seductive
7. Stimulating
8. Personal

These eight items were summed to form a composite measure for *Erotic Communication*. A t-test (4 feet vs 6 inches) on the *Erotic Communication* measure revealed a significant effect for Distance ($p<.05$), with dancers at 6 inches being rated as more generally erotic overall than their 4 foot counterparts. These results are displayed in **Figure 1**.

Individual analysis on each of the eight items showed significant effects on the following questions:

a. Alluring with a message of temptation ($p<.05$)

b. Seductive ($p<.05$)

c. Stimulating ($p<.05$)

d. Personal ($p<.05$)

These results are displayed in **Figure 3**. In all cases, dancers at 6 inches were rated as communicating these ideas more so than dancers at 4 feet. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

DISCUSSION

Governmental restrictions on distance, when applied to the context of erotic performance dance, are not merely time, place and manner restrictions that have no impact on the content of speech. Distance is, itself, a part of the communication expressed in erotic performance dance. These restrictions are related to the content of erotic performance dance expression, and significantly and substantially alter the content of the message being conveyed by the performer and the meaning ascribed to the dance by the viewer. Significant and substantial changes in the erotic message and relational message is noted when the entertainers move further away from the patron. The present study strongly demonstrated that the effectiveness of the communication as contained in a dancer's performance was significantly altered by the condition of distance. Overall, dancers at 6 inches were seen as expressing a significantly stronger relational and erotic message than dancers at 4 feet. It is our opinion, based upon both empirical and theoretical research in this area, that as the distance increased to 10 feet these effects would be even stronger. There is no question from these studies that the effectiveness and content of these messages are significantly impacted by distance.

REFERENCES

Barnes v. Glen Theatre, 501 U.S. 510, 115 L.Ed.2d 504, 511, 514 (1991)

KEV, Inc., v. Kitsap County, 299 F2d 1053 (9th Cir. 1986).

Miller v. Civil City of South Bend, 904 F2d 1081, 1089 (7th Cir. 1990)

O'Day et al., v. King County, 109 Wn 2d 796, 749 P. 2d (1988).

LIST OF FIGURES

Figure 1: Effect of Distance on Combined Communication Scales

Figure 2: Effect of Distance on Relational Communication Items

Figure 3: Effect of Distance on Erotic Communication Items

Figure 1
Effect of Distance on Combined Scales

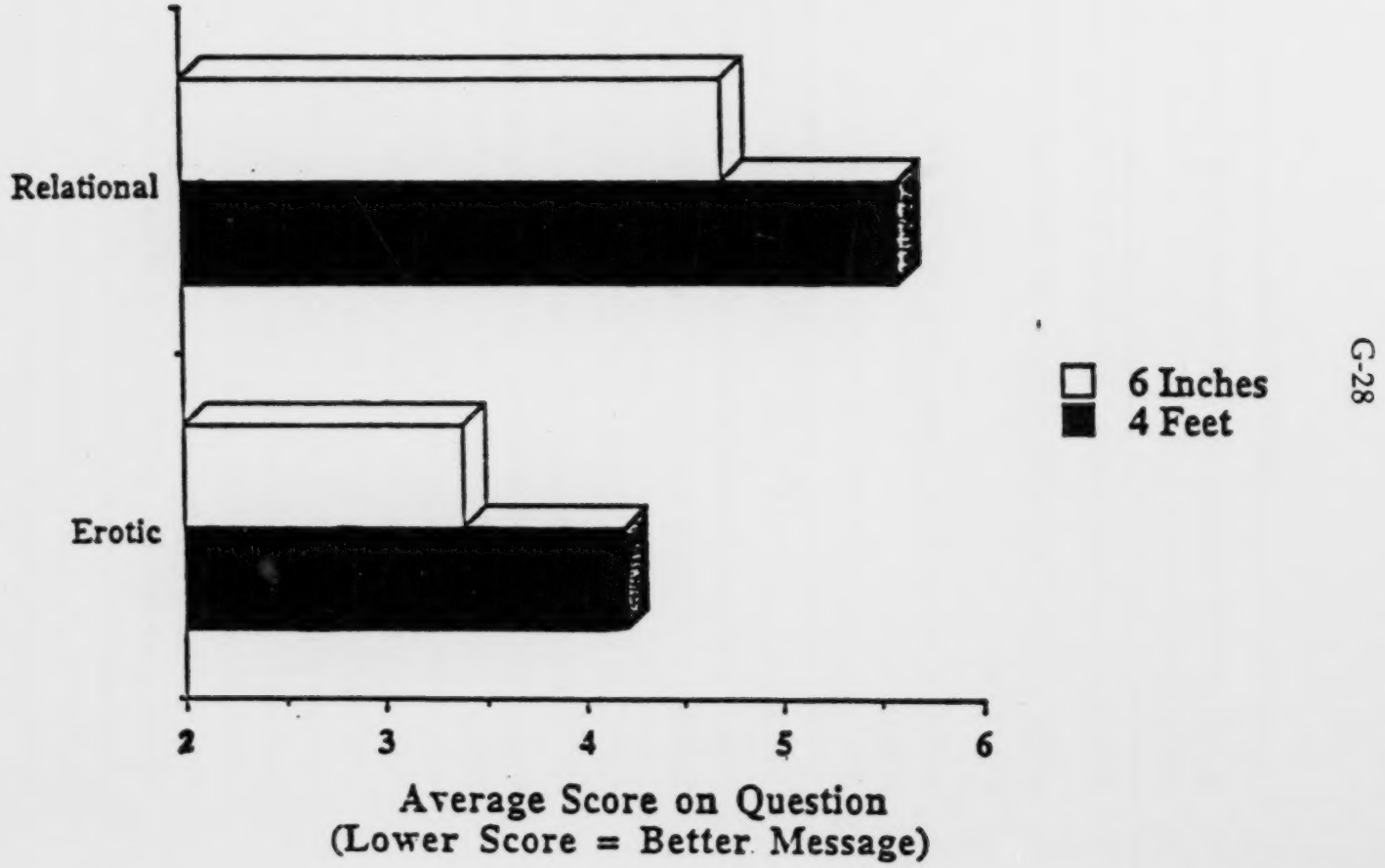

Figure 2
Effect of Distance on Relational Communication Items

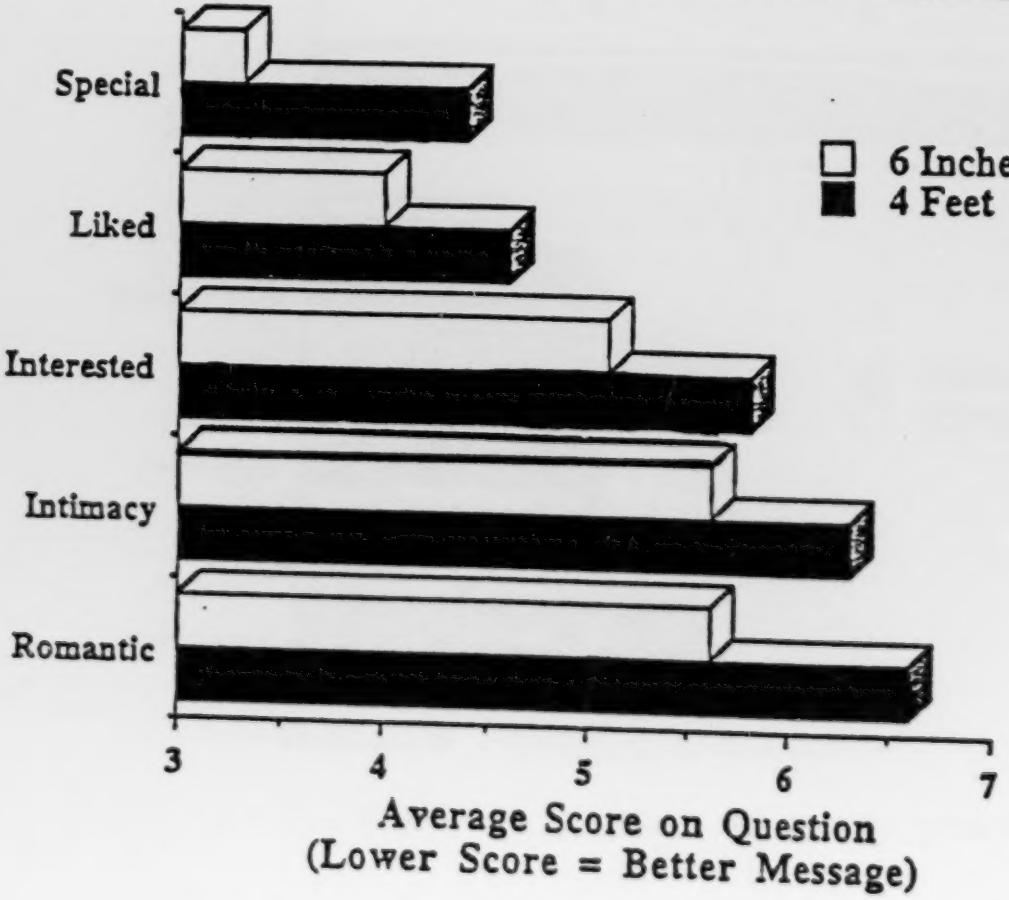

Figure 3
Effect of Distance on Erotic Items